Aug 1.

96

CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS

OF THE

STATE OF MISSOURI

FROM MAY 1, 1883, TO JANUARY 2, 1884.

REPORTED BY

A. MOORE BERRY,

OFFICIAL REPORTER.

VOL. XIV.

ST. LOUIS:

G. I. JONES AND COMPANY.

1885.

Digitized by Google

Entered according to Act of Congress, in the year 1885, by
A. MOORE BERRY,
In the Office of the Librarian of Congress, at Washington.

Rec. March 4, 1885

St. Louis: Press of Nixon-Jones Printing Co.

Digitized by Google

JUDGES

OF THE

ST. LOUIS COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HON. EDWARD A. LEWIS, *Presiding Judge.*
HON. ROBERT A. BAKEWELL, } *Judges.*
HON. SEYMOUR D. THOMPSON, }

JOSEPH A. BAIER . . . . *Clerk.*
A. MOORE BERRY . . . . *Reporter.*

Digitized by Google

Digitized by Google

TABLE OF CASES DETERMINED.

	PAGE
Alabama & Georgia Manufacturing Company *v.* Third National Bank	576
Alexander *v.* Rollins	109
—— *v.* Williams	18
Allen, Dowling *v.*	590
Altenbernd, Kortjohn *v.*	842
Ammidown *v.* Powell	578
Arnot *v.* Branconnier	481
Augusta Wine Company *v.* Weippert	483
Avery, Voigt *v.*	48
Baker, Glasgow *v.*	201
——, Lionberger *v.*	353
Bank of Commerce *v.* Chambers	152
Baumeister, Dyer *v.*	575
Bernero, Woolf *v.*	518
Best, Pope Iron and Metal Company *v.*	502
Beveridge *v.* Richmond	405
Blackburn *v.* Bolan	592
Bobb, Zelle *v.*	267
Boehme, Koenig *v.*	598
Bolan, Blackburn *v.*	592
Bosbyshell, Williamson-Stewart Paper Company *v.*	534
Bouquette, In re	576
Bowman *v.* St. Louis Times Company	575
Boyd, Rosenberg *v.*	429
Bracksieck, Meincke *v.*	315
Branconnier, Arnot *v.*	481
Brinsmade *v.* Groll	444
Britton, Heman *v.*	121
Broadway Foundry Company, Grogan *v.*	588
Brown *v.* Missouri Pacific Railway Company	580
Bryce *v.* Foy	593
Burke *v.* Daly	542
Burns, Harris *v.*	229
——, The State *v.*	581

Digitized by Google

	PAGE
Bush, Hoyle *v.*	408
Butchers and Drover's Bank, Reilley *v.*	598
Cabanné *v.* Spaulding	312
——, The State ex rel. *v.*	294
——, The State to use, *v.*	455
Cahill *v.* Liggett & Myers Tobacco Company	596
Canada Southern Line, Ring *v.*	579
Carroll *v.* People's Railway Company	490
Cassatt *v.* Vogel	317
Central St. Louis Masonic Hall Association, The State ex rel. *v.*	597
Chambers, Bank of Commerce *v.*	152
Charm Manufacturing Company *v.* Donovan	591
Chatham National Bank *v.* Goldsoll	586
Chicago and Alton Railroad Company, Traube *v.*	591
Christy *v.* Flanagan	253
City of St. Louis, Cummings *v.*	575
——, Excelsior Manufacturing Company *v.*	575
—— *v.* Greely	578
——, Harrington *v.*	575
—— *v.* Herthel	467
——, Howard *v.*	575
—— *v.* Lindell Railway Company	575
——, Mitchell *v.*	600
—— *v.* Priest	575
—— *v.* St. Louis Railroad Company	221
—— *v.* Waterloo-Carondelet Turnpike and Ferry Company	216
Clark, Lynds *v.*	74
——, Roos *v.*	594
Clopton, O'Fallon *v.*	582
Cloud *v.* St. Louis, Iron Moutain and Southern Railway Company	186
Connecticut Mutual Life Insurance Company, Nelson *v.*	592
Conn *v.* McCullough	584
Coquard, Crawford *v.*	575
—— *v.* Marshall	80
Covey *v.* Yarnall	598
Cramer, Garrett *v.*	401
Crawford *v.* Coquard	575
——, Frank *v.*	599
Crews *v.* Garneau	505
Cronin, St. Louis Brokage Company *v.*	587
Cummings *v.* Ruckert	557
—— *v.* St. Louis	575
Dailey *v.* Singer Manufacturing Company	597
Daly, Burke *v.*	542

Digitized by Google

	PAGE
Davis *v.* Schields	397
——, The State *v.*	198
Davidson, Ward *v.*	575
Dewald, Fendler *v.*	60
Dewey *v.* Massingale	579
Doerge, Sontag *v.*	577
Donahue *v.* Maloney	578
Donnelly *v.* Hodgson	548
Donovan, Charm Manufacturing Company *v.*	591
Dowling *v.* Allen	590
Downing *v.* Kinealy	575
Dyas *v.* Hanson	363
Dyer *v.* Baumeister	575
—— *v.* Krackauer	39
—— *v.* Reitz	45
—— *v.* Wittler	52
Duross, Haeussler *v.*	103
Earl *v.* Hart	594
Ehlermann *v.* St. Louis National Bank	591
Eliot *v.* Merchant's Exchange	234
Engelman *v.* Skrainka	488
Erdbruegger *v.* Meier	258
Excelsior Manufacturing Company *v.* St. Louis	575
Ex parte Higgins	601
Fendler *v.* Dewald	60
Ferguson *v.* Pendleton	575
Flanagan, Christy *v.*	253
Fourth National Bank *v.* Noonan	243
Foy, Bryce *v.*	598
Francis *v.* Grote	324
Francisco *v.* Rowland	600
Frank *v.* Crawford	599
Friese, Schoenlau *v.*	436
Frost, Knight *v.*	331
Fulton Iron Works *v.* Riggin	321
Funsten *v.* Snyder	446
Garneau, Crews *v.*	505
Garrett *v.* Cramer	401
Gitchell *v.* Messmer	83
Glasgow *v.* Baker	201
Goldsoll, Chatham National Bank *v.*	586

Digitized by Google

	PAGE
Gorla, Strathman *v.*	1
Gray, Hutchinson *v.*	575
Great Western Despatch, Lesinsky *v.*	598
Greely, St. Louis *v.*	578
Gregory, The State to use *v.*	583
Grogan *v.* Broadway Foundry Company	588
Groll, Brinsmade *v.*	444
Grote, Francis *v.*	324
Gugerty *v.* Vieths	577
Haeussler *v.* Duross	103
Hake, The State *v.*	575
Hannon *v.* Logan	83
Hanson, Dyas *v.*	363
Harrington *v.* St. Louis	575
Harris *v.* Burns	229
Harrison Wire Company, Peters *v.*	599
Harrison, Wolter *v.*	592
Hart, Earl *v.*	594
Hartman, Meyer *v.*	130
Haskell *v.* Sells	91
Hayes, The State *v.*	173
Heinrich, The State ex rel. *v.*	146
Heman *v.* Britton	121
——, *v.* Skrainka	577
Herthel, St. Louis *v.*	467
Hewitt *v.* Spannagel	600
Higgins, Ex parte	601
Hilder, Williamson Stewart Paper Company *v.*	596
Hildreth Printing Company *v.* Stokes	591
Hodgson, Donnelly *v.*	548
Holliday, Frost *v.*	331
Holt *v.* Simmons	450
Hoosac Tunnel Company, Watson *v.*	585
Howard, Stevenson *v.*	250
—— *v.* Still	584
—— *v.* St. Louis	575
Hoyle *v.* Bush	408
Hunt *v.* Missouri Railroad Company	160
Hutchinson *v.* Gray	575
In re Bouquette	576
In re Nitsche	213
Irons *v.* Price	179

Digitized by Google

	PAGE
Jones, The State *v.*	589
——, The State ex rel *v.*	595
Kinealy, Downing *v.*	575
—— *v.* Parke	598
Knight *v.* Frost	881
Koenig *v.* Boehme	598
Kortjohn *v.* Altenbernd	842
Krackauer, Dyer *v.*	39
Kramer *v.* People's Insurance Company	584
Laclede Gas-Light Company, Lampert *v.*	876
Lampert *v.* Laclede Gas-Light Company	876
Lang, The State *v.*	247
Leahey, Lewis *v.*	564
Leary, Nolte *v.*	598
Lee, Ryan *v.*	599
Leete *v.* Pilgrim Congregational Society	590
Lesinsky *v.* Great Western Despatch	598
Lewis *v.* Leahey	564
——, The State *v.*	191
—— *v.* Thomas	581
Liebke *v.* Methudy	65
Liggett & Myers Tobacco Company, Cahill *v.*	596
Lindell Railway Company, St. Louis *v.*	575
Lionberger *v.* Baker	853
Logan, Hannon *v.*	33
Long *v.* Uhlich	594
Lubke, The State ex rel *v.*	587
Luehman, Rubelman *v.*	601
Lynds *v.* Clark.	74
McCullough, Conn *v.*	584
McNeary, The State *v.*	410
Maloney, Donahue *v.*	578
Marshall, Coquard *v.*	80
Martin *v.* Prietto	596
Massingale, Dewey *v.*	579
Meagher *v.* People's and Tower Grove Railway Company	499
Meier, Erdbruegger *v.*	258
Meincke *v.* Bracksieck	315
Mellier *v.* St. Louis and New Orleans Transportation Company	281
Merchants' Exchange, Eliot *v.*	284
Mertz, The State to use *v.*	55
Merz *v.* Missouri Pacific Railway Company	459

Digitized by Google

	PAGE
Messmer, Gitchell *v.*	83
Methudy, Liebke *v.*	65
Meyer *v.* Hartman	180
Miller *v.* Miller	418
Mitchell *v.* St. Louis	600
Missouri Pacific Railway Company, Brown *v.*	580
——, Merz *v.*	459
——, Sappington *v.*	89
Missouri Railroad Company, Hunt *v.*	160
Murphy, The State *v.*	73
Nagel *v.* Schilling	576
Nelson *v.* Connecticut Mutual Life Insurance Company	592
—— *v.* Withrow	270
Nitsche, In re	218
Nolte *v.* Leary	598
Noonan, Fourth National Bank *v.*	243
Oertel, Skrainka *v.*	474
O'Fallon, Clopton *v.*	582
Parke, Kinealy *v.*	593
Parks *v.* Richardson	593
Patton *v.* West End Narrow Gauge Railway Company	589
Paxson *v.* Talmage	586
Pearson *v.* Union Railway Company	580
Pendleton, Ferguson *v.*	575
People's Insurance Company, Kramer *v.*	584
People's Railway Company, Carroll *v.*	490
People's Tower Grove Railway Company, Meagher *v.*	499
Peters *v.* Harrison Wire Company	599
Pettigrew *v.* St. Louis Ore and Steel Company	441
Pilgrim Congregational Society, Leete *v.*	590
Police Commissioners, The State ex rel. *v.*	297
Pollard, The State *v.*	583
Pope Iron and Metal Company *v.* Best	502
Powell, Ammidown *v.*	578
Price, Irons *v.*	179
Priest, St. Louis *v.*	575
—— *v.* Way	590
Prietto, Martin *v.*	596
Reilly *v.* Butchers and Drovers' Bank	598
—— *v.* Reilly	62
Reitz, Dyer *v.*	45

Digitized by Google

	PAGE
Richardson, Parks *v.*	593
Richmond, Beveridge *v.*	405
——, Rohan *v.*	595
Rider *v.* Wabash, St. Louis and Pacific Railway Company	529
Riggin, Fulton Iron Works *v.*	321
Ring *v.* Canada Southern Line	579
Rohan *v.* Richmond	595
Rollins, Alexander *v.*	109
Roos *v.* Clark	594
Rose, The State *v.*	567
Rowland, Francisco *v.*	600
Rosenberg *v.* Boyd	429
Rubelman *v.* Luehman	601
Ruckert, Cummings *v.*	557
Ruth, The State *v.*	226
Ryan *v.* Lee	599
Salorgne, Soursin *v.*	486
Sappington *v.* Missouri Pacific Railroad Company	86
Schields, Davis *v.*	397
Schilling, Nagel *v.*	576
Schmidt, The State *v.*	581
Schoenlau *v.* Friese	436
Schrader, Siemers *v.*	346
Schwartz, The State *v.*	575
Sells, Haskell *v.*	91
Shaw *v.* Shaw	580
Shepard, The State *v.*	585
Siemers *v.* Schrader	346
Simmons, Holt *v.*	450
Singer Manufacturing Company, Dailey *v.*	597
Skrainka, Engelman *v.*	438
——, Heman *v.*	577
—— *v.* Oertel	474
Smith *v.* Smith	575
—— *v.* St. Louis Beef Canning Company	522
——, The State *v.*	585
——, The State ex rel. *v.*	589
Snyder, Funsten *v.*	446
Sontag *v.* Doerge	577
Soursin *v.* Salorgne	486
Spannagel, Hewitt *v.*	600
Spaulding, Cabanné *v.*	312
State (The) *v.* Burns	581
—— *v.* Davis	198

Digitized by Google

PAGE

State (The) *v.* Hake 575
—— *v.* Hayes 173
—— *v.* Jones 589
—— *v.* Lang 247
—— *v.* Lewis 191
—— *v.* McNeary 410
—— *v.* Murphy 78
—— *v.* Pollard 583
—— *v.* Rose 567
—— *v.* Ruth 226
—— *v.* Schmidt 581
—— *v.* Schwartz 575
—— *v.* Shephard 585
—— *v.* Smith 585
—— *v.* Williams 591
State (The) ex rel. *v.* Cabanné 294
—— *v.* Central Missouri Hall Association 597
—— *v.* Heinrich 146
—— *v.* Jones 595
—— *v.* Lubke 587
—— *v.* Police Commissioners 297
—— *v.* Smith 589
—— *v.* Uhrig 413
—— *v.* Vogel 187
State (The) to use *v.* Cabanné 455
—— *v.* Gregory 583
—— *v.* Mertz 55
Stevenson *v.* Howard 250
Still, Howard *v.* 584
St. Louis Beef Canning Company, Smith *v.* 522
St. Louis Brokerage Company *v.* Cronin 587
St. Louis, City of, Cummings *v.* 575
——, Excelsior Manufacturing Company *v.* 575
—— *v.* Greely 578
——, Harrington *v.* 575
—— *v.* Herthel 467
——, Howard *v.* 575
—— *v.* Lindell Railway Company 575
——, Mitchell *v.* 600
—— *v.* Priest 575
—— *v.* St. Louis Railroad Company 221
—— *v.* Waterloo-Carondelet Turnpike and Ferry Company . . 216
St. Louis Iron Mountain and Southern Railway Company, Cloud *v.* 138
St. Louis National Bank, Ehlermann *v.* 591
St. Louis and New Orleans Transportion Company, Mellier *v.* . 281

Digitized by Google

	PAGE
St. Louis Railroad Company, St. Louis v.	221
St. Louis Ore and Steel Company, Pettigrew v.	441
St. Louis Times Company, Bowman v.	575
Stokes, Hildreth Printing Company v.	591
Strathman v. Gorla	1
Talmage, Paxson v.	585
Thomas, Lewis v.	581
Third National Bank, Alabama and Georgia Manufacturing Company v.	576
Traube v. Chicago and Alton Railroad Company.	591
Uhlich, Long v.	594
Uhrig, The State ex rel. v.	413
Union Railway Company, Pearson v.	580
Vieths, Gugerty v.	577
Vogel, Cassatt v.	317
——, The State ex rel. v.	187
Voigt v. Avery	48
Wabash, St. Louis and Pacific Railway Company, Rider v.	529
Ward v. Davidson	575
Waterloo-Carondelet Turnpike and Ferry Company, St. Louis v.	216
Watson v. Hoosac Tunnel Line Company	585
Way, Priest v.	590
Weippert, Augusta Wine Company v.	488
West-End Narrow Gauge Railway Company, Patton v.	589
Williams, Alexander v.	13
——, The State v.	591
Williamson-Stewart Paper Company v. Bosbyshell	584
—— v. Hilder	596
Withrow, Nelson v.	270
Wittler, Dyer v.	52
Wolter v. Harrison Wire Company	592
Woolf v. Bernero	518
Yarnall, Covey v.	598
Zelle v. Bobb	267

Digitized by Google

Digitized by Google

TABLE OF MISSOURI CASES CITED.

	PAGE
Abbott *v.* Sheppard, 44 Mo. 273	132
Alexander *v.* Lupe, 11 Mo. App. 397	112
—— *v.* Relfe, 9 Mo. App. 133	28, 112
—— *v.* Relfe, 74 Mo. 495	116
Anderson *v.* Brown, 9 Mo. 646	132
Austin *v.* The State, 10 Mo. 593	412
Bailey *v.* Bank, 7 Mo. 467	156
Banks *v.* Lades, 39 Mo. 406	264
—— *v.* Wells, 12 Mo. 361	258
Barbaro *v.* Occidental Grove, 4 Mo. App. 429	430
Barrett *v.* Bank, 6 Mo. App. 319	55
—— *v.* Evans 28 Mo. 331	156
Bateson *v.* Clark, 37 Mo. 34	452, 454
Beardslee *v.* Perry, 14 Mo. 88	434
Bell *v.* Hoagland, 15 Mo. 364	323
Berkley *v.* Kobes, 13 Mo. App. 502	50, 52
Bevin *v.* Powell, 11 Mo. App. 216	264, 278, 357
Bigbee *v.* Coombs, 64 Mo. 529	499
Bigelow *v.* Railroad, 48 Mo. 510	261, 268
Blackwell *v.* Bailey, 1 Mo. App. 320	421
Blakey *v.* Blakey, 27 Mo. 39	276, 279
Bledsoe *v.* Simms, 53 Mo. 308	84
Boatmen's Bank *v.* Grewe, 13 Mo. App. 335	84
Booge *v.* Railroad, 33 Mo. 212	489
Bosley *v.* Hart, 7 Mo. App. 581	272
Boyer *v.* Boogher, 11 Mo. App. 130	407
Bradford *v.* Pearson, 12 Mo. 71	421
Brashears *v.* Strock, 46 Mo. 221	12
Brown *v.* Railroad, 13 Mo. App. 462	90
—— *v.* Railroad, 50 Mo. 461	466
Brownell *v.* Railroad, 47 Mo. 243	259
Buck *v.* Ashbrook, 51 Mo. 539	419
Buford *v.* Packet Co., 3 Mo. App. 159	363
Burt *v.* Warne, 31 Mo. 296	5, 9
Butler *v.* Gambs, 1 Mo. App. 466	407

Digitized by Google

PAGE
Casey v. Clark, 2 Mo. 12 8
Charles v. McCune, 57 Mo. 156 521
City v. Allen, 53 Mo. 44 191
—— v. Laughlin, 49 Mo. 559 470
Chouteau v. Nuckolls, 20 Mo. 442 255
Clark v. Holliday, 9 Mo. 711 190
—— v. Railroad, 36 Mo. 215 . . . . 259, 261
Collins v. Barding, 65 Mo. 496 452
Corby v. Tracy, 62 Mo. 511 453
Coste v. Stifel, 8 Mo. App. 601 272
Coughlin v. Lyon, 24 Mo. 533 . . . . 5, 9
Craig v. Smith, 65 Mo. 536 149
Crawshaw v. Wright, 5 Mo. App. 577 7
Cummings v. Wright, 11 Mo. App. 348 554
Cunningham v. Railroad, 70 Mo. 202 21

Daly v. Bank, 56 Mo. 94 372
Davidson v. Peck, 4 Mo. 438 261
Davis v. Farmer, 28 Mo. 55 402
DeGrau v. Prior, 53 Mo. 313 . . . . 48, 49
Dillon v. Rash, 27 Mo. 243 337
Durfee v. Moran, 57 Mo. 374 441
Dyer v. Brannock, 66 Mo. 391 54

Eager v. Stover, 59 Mo. 87 138
Early v. Fleming, 16 Mo. 154 . . . . 5, 9
Eckert v. Railroad, 13 Mo. App. 352 465
Edgar v. Salisbury, 17 Mo. 271 . . . . 277, 279
Ellis v. Andrews, 25 Mo. 327 272
Empire Co. v. Boggiano, 52 Mo. 294 366
Ex parte Page, 49 Mo. 291 149
—— Toney, 11 Mo. 661 149

Fickle v. Railroad, 54 Mo. 219 264
Finney v. The State, 9 Mo. 642 . . . . 260, 262
Fisher v. Seligman, 7 Mo. App. 383 102
Fitzgerald v. Murphy, 9 Mo. App. 572 . . . . 6, 9
Fowler v. Williams, 62 Mo. 403 404
Franklin v. Gumersell, 11 Mo. App. 306 486
Freeman v. Wilkerson, 50 Mo. 554 525
Fuert v. Rowell, 62 Mo. 524 296
Fugate v. Pierce, 49 Mo. 441 445
Fugitt v. Nixon, 44 Mo. 295 369

Gatewood v. House, 65 Mo. 663 296
Gerhardt v. Boatmen's Inst., 48 Mo. 60 . . . . . . 368, 372

Digitized by Google

	PAGE
German Bank *v.* Stumpf, 73 Mo. 314	351, 545
Gilchrist *v.* Donnell, 53 Mo. 591	156
Gilstrap *v.* Felts, 50 Mo. 428	265
Gist *v.* Loring, 60 Mo. 487	7, 12
Givens *v.* Van Studdiford, 13 Mo. App. 168	272, 275
Glasgow *v.* Baker, 72 Mo. 441	209, 210
——— *v.* Lindell, 50 Mo. 60	208, 210
Grayson *v.* Wedle, 63 Mo. 523	548
Griffin *v.* Samuel, 6 Mo. 51	261
Gritchell *v.* Kreidler, 12 Mo. App 497	84, 85
Groner *v.* Smith, 49 Mo. 318	149
Hale *v.* Van Dever, 67 Mo. 732	5
Hamilton *v.* Moody, 21 Mo. 79	402
Harriman *v.* Stowe, 57 Mo. 93	385, 445
Hayden *v.* Cogan, 9 Mo. App. 492	37
——— *v.* Tucker, 37 Mo. 214	480
Haywood *v.* Insurance Co., 52 Mo. 181	498
Higgins *v.* Petzer, 49 Mo. 152	132
Hilliker *v.* Francisco, 65 Mo. 603	277
Hook *v.* Turner, 22 Mo. 333	441
Hooper *v.* Hooper, 19 Mo. 355	420
Horstkotte *v.* Menler, 50 Mo. 158	404
Houck *v.* Cross, 67 Mo. 152	190
Howard *v.* Stevenson, 11 Mo. App. 410	252
Jefferson City *v.* Opel, 67 Mo. 394	452
Keene *v.* Barnes, 29 Mo. 384	327
Kehlor *v.* Lademann, 11 Mo. App. 553	554
Kellogg *v.* Carrico, 47 Mo. 159	546
Kelly *v.* Railroad, 75 Mo. 138	465
Kenney *v* Railroad, 70 Mo. 243	90
Keohler *v.* Feuerbacher, 2 Mo. App. 11	7
Kershaw *v.* Fitzpatrick, 3 Mo. App. 575	277, 279
Kitchen *v.* Railroad, 69 Mo. 224	28
—— *v.* Railroad, 59 Mo. 514	527
Knapp *v.* Skeele, 31 Mo. 434	398
Krank *v.* Nichols, 6 Mo. App. 72	49
La Grange *v.* Mays, 29 Mo. 64	101
Lampert *v.* Gas-Light Co., 12 Mo. App. 576	377
Lawnin *v.* Bradley, 13 Mo. App. 361	441
Latshaw *v.* McNees, 50 Mo. 381	149
Lesinsky *v.* Despatch, 13 Mo. App. 576	378

Digitized by Google

PAGE
Lewis v. Lewis, 5 Mo. 278 410
Life Association v. Boogher, 3 Mo. App. 178 415
Lin v. Railroad, 10 Mo. App. 125 143
Lionberger v. Bank, 10 Mo. App. 499 101
Lowis v. Cutter, 6 Mo. App. 54 277

McCarthy v. Wolf, 40 Mo. 520 404
McDonald v. Schneider, 12 Mo. 405 205
McGrade v. German Inst., 4 Mo. App. 380 382
Mann v. Schroer, 50 Mo. 306 87
Manville v. Roever, 11 Mo. App. 317 82
Marks v. Hardy, 12 Mo. App. 595 . . . . 388, 389
Marquis v. Clark, 64 Mo. 601 452
Marx v. Fore, 51 Mo. 69 182
Massey v. Scott, 49 Mo. 278 190
Mechanics' Bank v. Schaumburg, 38 Mo. 228 498
Merz v. Railroad, 13 Mo. App. 589 . . . . 460, 463, 465
Metropolitan Bank v. Taylor, 62 Mo. 338 378
Meyer v. Campbell, 12 Mo. 603 256
Miller v. Mellier, 59 Mo. 388 407
Mississippi Mill v. Church, 54 Mo. 520 404
Mooney v. Kennett, 19 Mo. 551 261
Moore v. Moore, 51 Mo. 118 . . . . 419, 421
—— v. Whitcomb, 48 Mo. 544 555
Morton v. Reeds, 6 Mo. 84 380

Napton v. Leaton, 71 Mo. 358 188
Neier v. Railroad, 12 Mo. App. 25 463
Nelson v. Withrow, 14 Mo. App. 270 455

O'Bryan v. O'Bryan, 13 Mo. 16 423
Owen v. Brockschmidt, 54 Mo. 285 445
Owens v. Andrew, 49 Mo. 372 310
—— v. Railroad, 58 Mo. 386 261
Ownby v. Ely, 58 Mo. 475 191

Patchin v. Bonsack, 52 Mo. 431 546
Peacock v. Nelson, 50 Mo. 256 527
Pearson v. Inlow, 20 Mo. 322 . . . . 5, 9
Phillips v. Fitzpatrick, 34 Mo. 276 7
Pickering v. Telegraph Co., 47 Mo. 457 265
—— v. Templeton, 2 Mo. App. 429 101
Pitts v. Fugate, 41 Mo. 405 261
Powell v. Gatt, 18 Mo. 358 149

Digitized by Google

	PAGE
Quinn *v.* Stout, 31 Mo. 160	7
Raeder *v.* Brusberg, 6 Mo. App. 445	276
Ragan *v.* McCoy, 29 Mo. 356	528
Ransom *v.* Cobb, 67 Mo. 375	191
Razor *v.* Railroad, 73 Mo. 471	12
Rector *v.* Hartt, 8 Mo. 457	480
Reigert *v.* Voelker, 6 Mo. App. 53	7
Relfe *v.* Insurance Co., 5 Mo. App. 173	29
Rickey *v.* Tenbroeck, 63 Mo. 563	407
Ridgeway *v.* Kennedy, 52 Mo. 224	421
Riley *v.* Kershaw, 52 Mo. 24	499
Roach *v.* Burnes, 33 Mo. 319	182
Robinson *v.* Hood, 67 Mo. 660	452
Rooder *v.* Knoebel, 12 Mo. App. 589	82
Rose *v.* City, 49 Mo. 510	480
Rosenblatt *v.* Haberman, 8 Mo. App. 486	370
Ruble *v.* Thomasson, 20 Mo. 263	272
Salisbury *v.* Renick, 44 Mo. 554	369
Sanderson *v.* Reinstadler, 31 Mo. 483	154
Sauer *v.* Griffin, 67 Mo. 654	320
Schaffer *v.* Finn, 46 Mo. 248	102
—— *v.* Gruen, 4 Mo. App. 115	100
Schulenberg *v.* Robinson, 5 Mo. App. 564	87
Seibert *v.* Allen, 61 Mo. 482	261
Self *v.* Cordell, 45 Mo. 345	409
Semple *v.* Thomas, 10 Mo. App. 457	351, 546
Senter *v.* Bank, 7 Mo. App. 532	371
Silvey *v.* Summer, 61 Mo. 253	49, 85
Skrainka *v.* Allen, 76 Mo. 384	384, 389
Smith *v.* Monks, 55 Mo. 106	480
State (The) *v.* Banks, 73 Mo. 592	74, 588
—— *v.* Burns, 48 Mo. 438	228
—— *v.* Duckworth, 68 Mo. 156	272
—— *v.* Ellis, 74 Mo. 207	195
—— *v.* Koerner, 51 Mo. 174	265
—— *v.* Kring, 74 Mo. 612	176
—— *v.* Lipscomb, 52 Mo. 32	412
—— *v.* McGinniss, 74 Mo. 245	227
—— *v.* Pollard, 14 Mo. App.	176
—— *v.* Sanders, 68 Mo. 205	197
—— *v.* Tate, 12 Mo. App. 327	74
—— *v.* Taylor, 73 Mo. 52	412
—— *v.* Weiners, 66 Mo. 13	588

Digitized by Google

PAGE

State (The) v. West, 69 Mo. 404 227
—— v. Zumbunson, 18 Mo. App. 592 176
State (The) ex rel. v. Cabanné, 14 Mo. App. 294 458
—— v. Dulle, 45 Mo. 270 . . . . 259, 261
—— v. Finn, 11 Mo. App. 400 150
—— v. Garroutte, 67 Mo. 445 378
—— v. Hermann, 11 Mo. App. 43 305
—— v. Meagher, 44 Mo. 356 527
State (The) to use v. Campbell, 10 Mo. 724 383
—— v. Dailey, 4 Mo. App. 172 190
—— v. Davis, 35 Mo. 406 385
—— v. Weinel, 13 Mo. App. 583 313
State Savings Association v. Bank, 11 Mo. App. 292 382
Stevenson v. Saline, 65 Mo. 425 452
Stillwell v. Craig, 58 Mo. 24 119
St. John v. Homans, 8 Mo. 382 371
St. Louis v. Allen, 53 Mo. 44 261
—— v. Laughlin, 49 Mo. 559 470
St. Louis Railroad v. Railroad, 72 Mo. 67 224
Swartz v. Nicholson, 65 Mo. 508 12

Tatum v. Brooker, 51 Mo. 148 409
Taylor v. City, 14 Mo. 20 480
Thornton v. Irwin, 43 Mo. 163 548
Tingley v. Cowgill, 48 Mo. 291 445

United States v. Ferguson, 16 Mo. 258 404

Valle v. Obenhause, 62 Mo. 81 . . . . 54, 84
Vogel v. Vogel, 13 Mo. App. 588 . . . . 419, 421

Wallace v. Wilson, 30 Mo. 335 362
Warner v. Morin, 13 Mo. 455 . . . . 264, 265
Wathen v. Farr, 8 Mo. 324 12
Weil v. Kume, 49 Mo. 159 527
West v. Fowler, 55 Mo. 300; 59 Mo. 40 272
Whalen v. Railroad, 60 Mo. 323 91
Whittelsey v. Brohammer, 31 Mo. 98 320
Wiser v. Chisley, 53 Mo. 547 434
Whitehouse v. Railroad, 64 Mo. 523 87
Wolff v. Schaeffer, 4 Mo. App. 367 527
Wood v. Railroad, 58 Mo. 109 430
Wooton v. Hinkle, 20 Mo. 290 441

Zeller v. German Inst., 4 Mo. App. 401 362

Digitized by Google

TABLE OF STATUTES CITED, CONSTRUED, ETC.

	PAGE
Actions, Rev. Stats., sects. 3283, 3286, 3468	57
—— Rev. Stats., sect. 3462	382
—— Rev. Stats., sect. 3461	525
Administration, Rev. Stats., sects. 247, 249	82
Amendments, Rev. Stats., sects. 3567, 3570	314
Appeals, Rev. Stats., p. 1505, sect. 9; Rev. Stats., sects. 3054–3055–3056–3057	398
Assault, Rev. Stats., sects. 1265, 1663	73
Assignments, Rev. Stats., sects. 2762–2765	356
Attachment, Rev. Stats., sects. 483, 485	316
Change of venue, Rev. Stats., sect. 2953	50, 51
Construction of statutes, Rev. Stats., sect. 3126	351
Corporations, Wag. Stats., p. 332; Rev. Stats., sects. 3149, 3168	99
—— Rev. Stats., sect. 926	100, 102
—— Rev. Stats. 1865, chap. 201, sect. 60	248
—— Sess. Acts 1877, p. 230	249
—— Rev. Stats., sect. 736	332, 550
—— Rev. Stats., sect. 745	551
Costs, Rev. Stats., sect. 1006	269
—— Rev. Stats., sect. 986	408
Counter-claim, Rev. Stats., sect 3522	315, 366
—— Rev. Stats., sect. —	
Criminal Law, Rev. Stats., sects. 1265, 1663	73
Depositions, Rev. Stats., sect. 2150	213
—— Rev. Stats., sect. 1006	269
Executions, Rev. Stats. 1835, sect. 8; Rev. Stats. 1845, sect. 16	256
—— Rev. Stats., sect. 2440	313
Ferries, Rev. Stats., p. 1585	218
Forcible Entry and Detainer, Rev. Stats., sect. 2422	50
Franchises, Rev. Stats., p. 1585	218
—— Rev. Stats., p. 1616, sect. 1	224
Husband and Wife, Rev. Stats., sects. 3283, 3286, 3468	57
—— Rev. Stats., sect. 3295	85
Injunctions, Rev. Stats., sect. 2709	314
—— Rev. Stats., sect. 2722	481
Interest, Rev. Stats., sects. 2725, 2904	189
Judgments, Rev. Stats., sects. 2725, 2904	189
—— Rev. Stats., sects. 2731	254
—— Rev. Stats., sects. 2762–2765	356
Jurisdiction, Rev. Stats., sect. 2838	50
Justices of the Peace, Rev. Stats., sect. 2851	2

Digitized by Google

PAGE
Justices of the Peace, Rev. Stats. 1835, sect. 8, p. 354; Rev. Stats. 1845, sect. 8, p. 648; Rev. Stats. 1855, sect. 13, p. 981 . . 3
—— Rev. Stats., sects. 2422, 2838, 2958, 3126 50
—— Rev. Stats., sect. 2420 314
Licenses, Rev. Stats., p. 1585 218
Liens, Rev. Stats., sect. 2781 254
—— Wag. Stats., p. 909, sect. 5 278
—— Rev. Stats., sect. 2358 316
Limitations, Rev. Stats., sect. 3222 53
—— Rev. Stats., p. sect. 3224 54
Married Women, Rev. Stats., sects. 3296, 4010 . . . . .
Mortgages, Rev. Stats., sect. 2503 295
Municipal Corporations, Rev. Stats., p. 1585 218
—— Rev. Stats., p. 1616, sect. 1 224
Negotiable Instruments, Wag. Stats., p. 744, sects. 19, 20 . . 118
New Trials, Rev. Stats., sect. 3704 . . . . 260, 265
Notaries Public, Rev. Stats., sect. 2150 213
Notice, Rev. Stats., sect. 2503 295
—— Rev. Stats., sects. 3054, 3055, 3056, 3057 398
—— Rev. Stats., sects. 2380, 3373 546
Parties, Rev. Stats., sect. 3462 382
Partition, Rev. Stats., sect. 1006 269
—— Rev. Stats., sect. 3395 545
Pleadings, Rev. Stats., sect. 3603 164
Practice, Rev. Stats., sects. 3283, 3286, 3463 57
—— Rev. Stats., sect. 3603 164
—— Rev. Stats., sect. 3904 189
—— Rev. Stats., sect. 3704 . . . . 260, 265
—— Rev. Stats., sect. 1006 269
—— Rev. Stats., sect. 3774 320
Railroads, Rev. Stats., p. 1616, sect. 1 224
—— Rev. Stats. 1865, chap. 201, sect. 60 248
—— Sess. Acts 1877, p. 240 249
Revenue, Acts 1872, Adj. Sess., p. 128 325
Sales, Rev. Stats., sects. 2380, 3373 546
Sheriffs, Rev. Stats., sect. 3881 383
Statutes, Construction of, Rev. Stats., sect. 3126 351
Stock, Wag. Stats., p. 744, sects. 19, 20 118
Stockholders, Rev. Stats., sect. 736 . . . . 332, 550
—— Rev. Stats., sect. 745 351
Summons, Rev. Stats., sect. 6836 252
Taxes, Acts 1872, Adj. Sess., p. 128 325
Unlawful Detainer, Rev. Stats., sect. 2440 313
—— Rev. Stats., sect. 2420 314
Vendors' Liens, Rev. Stats., sect. 2358 316
Witnesses, Rev. Stats., sect. 2150 213
—— Rev. Stats., sects. 3296, 4010 445

Digitized by Google

CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS,

MARCH TERM, 1883.

HENRY STRATHMANN, Respondent, *v.* AUGUST GORLA, Appellant.

May 1, 1883. 14 1 / 79 606

1. JUSTICES OF THE PEACE — STATEMENT. — The statement, "Augustus Gorla to Henry Strathmann, Dr., to one-half amount of judgment for debt and costs in favor of G. E. Smith and against said Strathmann, in case No 84, August, 1880, before Von Gerichten, J. P., instituted by Smith against Strathmann & Gorla on their joint contract. Total amount, $44.30 — $22.15," is a sufficient statement of a cause of action before a justice of the peace. *Lewis, P. J.*, dissenting.
2. CONTRACTS — PUBLIC POLICY. — A contract to employ counsel to appear before a committee of the municipal assembly to advocate a measure in which the person employing counsel has an interest is not necessarily void as against public policy.

APPEAL from the St. Louis Circuit Court, BOYLE, J.

Affirmed.

H. B. O'REILLY, for the appellant.

T. J. CORNELIUS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This action was begun before a justice of the peace. The statement of the cause of action filed before the justice was as follows: —

"Augustus Gorla to Henry Strathmann, Dr., to one-half

Digitized by Google

amount of judgment for debt and costs in favor of C. E. Smith and against said Strathmann, in case No. 34, August 1880, before Von Gerichten, J. P., instituted by Smith against Strathmann & Gorla on their joint contract. Total amount, $44.30 — $22.15."

On trial anew in the circuit court, defendant moved to dismiss on the ground that there was no statement of the facts constituting the cause of action. This was overruled.

It appears from the testimony introduced on the trial that Strathmann & Gorla, having places of business near Twelfth and Olive Streets, in St. Louis, at a time when a city ordinance for restoring the hay market to the place on Twelfth Street, near Olive, where it had formerly been, was pending before a committee of the municipal assembly, employed one Smith, an attorney, to advocate the passage of this ordinance before this committee. The ordinance was defeated; and Smith sued Gorla & Strathmann for the fee agreed upon. After service of summons, Gorla paid Smith $15, and the suit was dismissed as to him; and Smith got judgment against Strathmann for $35 and costs, which Strathmann paid on execution. This action was for the recovery of one-half of the amount thus paid by Strathmann. There was judgment in favor of plaintiff for $10 and costs.

We think that the motion to dismiss was properly overruled. The statute provides (Rev. Stats. sect. 2851) that "no formal pleadings upon the part of either plaintiff or defendant shall be required in a justice's court; but, before any process shall be issued in any suit, the plaintiff shall file with the justice the instrument sued on, as a statement of the account, or of the facts constituting the cause of action upon which the suit is founded."

The revision of 1855 contained the provision (Rev. Stats. 1855, p. 931, sect. 13) that "in every suit not founded on an account, or on an instrument of writing, a statement

Digitized by Google

of facts constituting the cause of action shall be filed with the justice before any process shall be issued in the suit." The former revisions provided that, in all suits founded on instruments of writing, or on accounts, the instrument of writing, or bill of items, should be filed before issuing process (Rev. Stats. 1845, p. 810), and that, when the parties appear, the justice shall require a brief verbal statement of the nature of the demand. Rev. Stats. 1835, p. 354, sect. 8; Rev. Stats. 1845, p. 643, sect. 8. This last provision has been retained unchanged. In the revision of 1879, the statute was amended as to the written statement by consolidating the provisions of sections 9, 12 and 13, pages 700-1, of the revision of 1865, the law remaining substantially the same as it was in 1855, and as it has been ever since that time.

The act of 1825, establishing justice's courts, provided that "in all suits, a brief statement of the cause of action and the amount claimed, shall be made in writing and filed with the justice, and the same, or a copy annexed to the summons; but form, in such statement, shall not be regarded, so as the same be sufficient to apprise the defendant of the nature of the charge against him."

This provision seems to have been omitted from the revisions of 1825 and 1835, and is, as we have seen, substantially re-enacted in the revision of 1855. But the decisions as to the character of the statements required have been uniform; and it is not perceived that the supreme court has been more strict in its rulings when the law required a written statement in all cases — as it did before 1835 and since 1855 — than it was when there was no provision for any statement when the action was not upon a written instrument, other than the statement upon the docket of the justice, the bill of items, and the oral statement which the justice might require when the parties appeared for trial, and which he was directed to require if so requested by defendant.

Digitized by Google

It has been the uniform ruling in Missouri that matters of mere form might safely be disregarded in proceedings before a justice, and that for the reasons stated in *Casey* v. *Clark* (2 Mo. 12), that the object of the legislature was to simplify these proceedings, so that every man could be his own lawyer.

Where a written statement was required, it was held that it must be substantially such as would protect the plaintiff, by being a bar to another action for the same transaction, and, of course, that it should be of such a nature as would inform the defendant what he was sued about. Much might be left to implication; but there must be no such uncertainty as to leave a reasonable doubt as to what defendant was sued for. This is well illustrated by the case just cited, decided under the revision of 1825.

The statement of the cause of action is in these words "*John J. Clark* v. *Hardin Casey:* In an action of trespass, by the illegal use of one or more of his horses, in the summer of 1826, and the consequent loss of one of his horses at the bone mill in the town of Jefferson, or by imprudent and unauthorized usage thereof to one of his beasts, say a black mare, and he claims in damages for the same to the amount of $28." Was this action for the use of several horses? or for injury to several of them? or for the loss of one of them and, if so, which one? It does not appear that defendant could at all know from this statement what he was sued for, nor is there anything in the opinion from which it can be inferred that anything occurred upon the trial that would sufficiently inform the defendant what the suit was meant to be about. The statement remains obviously and variously defective in substance, after every implication has been unfolded to the utmost.

Early v. *Fleming* was a case in which plaintiff simply filed a bill of items for three hogs, whether purchased, killed, or stolen by defendant, the statement did not say.

Digitized by Google

The justice's docket showed the nature of the demand to be for stock of plaintiff shot by defendant. It was held that, as the parties manifestly understood the nature of plaintiff's demands, this was enough. 16 Mo. 154.

Inlow v. *Pearson* (20 Mo. 322) was an action of trespass for cutting and carrying away timber from plaintiff's land. The complaint was in the form of an account; but it was held sufficient, as the recovery was limited to the damages for the mere taking of the timber.

Burt v. *Warne* (31 Mo. 296) was an action for trespass. The statement was: "E. W. Warne in acc't Calvin C. Burt, Dr. To damage done to building and premises in block 84 of the city of St. Louis, $50." This was held to be sufficient.

In these cases, and many others that might be cited from our reports, from the earliest day up to this time, it is necessary to resort to implication to support the statement. The only inquiry has been whether the facts are sufficiently set forth to enable the plaintiff to know for what he is sued and to bar another suit for the same cause of action.

Coughlin v. *Lyons & Sullivan* (24 Mo. 533) was a case in which the evidence showed that defendant caused a constable to take the property in question from plaintiff's possession at the suit of defendant against another person, and that the constable still had possession of the property of which plaintiff was shown to be the owner. The statement was this: "James Lyon and Edward Sullivan, partners as Lyon & Sullivan, to Peter J. Coughlin, Dr., 1855, February 20th. To 41 hams, 464½ pounds at 10 cents, $46.45; 2 bbls. whisky, 77½ gals., at 28 cents, $21.70; total, $68.15." This statement, which seems to be for goods sold and delivered, was held to be good, though the action was for money had and received, the plaintiff waiving the tort. This case is cited and followed in *Hale* v. *Van Dever* (67 Mo. 732).

Digitized by Google

The following statement before a justice was held good in this court in *Fitzgerald* v. *Murphy* (9 Mo. App. 572): "Plaintiff states that heretofore, to wit, on the 20th of January, 1875, defendant made, executed, and delivered to plaintiff, for value received, his certain instrument of writing, hereto attached, in words and figures as follows, to wit: 'St. Louis, January 20th, 1875. Mr. James Coff: Please pay John Fitzgerald $57.00 for plastering done on your house on Compton Ave. C. C. Murphy.' That the said James Coff failed to accept or pay the said sum named in said instrument of writing, and has ever since failed and refused to do so; of all of which defendant was duly notified; that said sum of $57.00 remains due from defendant to plaintiff, and wholly unpaid, wherefore plaintiff prays judgment," etc. As the evidence showed that plaintiff, at defendant's request, and for him, had done plastering on Coff's house, and that upon plaintiff's applying to defendant for payment, defendant gave this order, which Coff refused to pay, and which represented the amount which defendant owed plaintiff, and that defendant afterwards promised to pay plaintiff the order, it was held that the defendant must have known from this statement what he was sued for, and that there was enough to bar another action, and that the statement was therefore sufficient.

The statement in the present case implies, though it does not say, that plaintiff had paid the judgment in question. It is impossible that defendant could misunderstand, and it is clear from the record that he perfectly well understood, what the action was about. The statement was sufficient, we think, to bar another action for the same matter, and we consider that we should be departing from a wholesome and well-established rule, were we to reverse this case, on the ground that a cause for action is not explicitly set out in the statement. "John Brown *v.* John

Digitized by Google

Smith, Dr., To one pair of shoes, January 1st, 1882, $3.50," sets out no cause of action whatever. Almost everything is left to implication. Yet such a statement is sufficient before a justice. *Quinn* v. *Stout*, 31 Mo. 160; *Philip* v. *Fitzpatrick*, 34 Mo. 276.

There are cases before a justice, to which the general rule above laid down will not apply: as, for instance, replevin suits, where the law requires certain statements to be made and sworn to before process shall issue. The rulings in such cases have manifestly no application to ordinary actions. *Gist* v. *Loring*, 60 Mo. 487; *Crawshaw* v. *Wright*, 5 Mo. App. 577; *Reigert* v. *Woelker*, 6 Mo. App. 53.

In the present case it sufficiently appears that the suit was predicated upon the implied contract for contribution, though this is not expressly stated. Just as in an action before a justice for goods sold and delivered, it sufficiently appears that the plaintiff claims that he sold and delivered to defendant the goods mentioned in the bill of items, and that the prices are reasonable, though nothing of the kind is said.

We see nothing in the objection that the contract of Smith with Gorla & Strathmann was void or against public policy. It is allowable to employ counsel to appear before a legislative body or before one of its committees, to advocate or oppose a measure in which the person so employing counsel is interested. *Fuller* v. *Dane*, 18 Pick. 480; *Wood* v. *McCann*, 6 Dana, 367; *Koehler* v. *Feuerbacher*, 2 Mo. App. 11. It does not appear that the counsel was himself interested in the matter or that any sinister means were used. That other citizens might also have been interested in removing the market, and that Smith might also represent them, is no objection to his being specially retained and paid by Gorla & Strathmann.

Digitized by Google

We see no ground whatever for reversing the judgment. Judge THOMPSON concurs. Judge LEWIS thinks the statement insufficient and for that reason dissents.

Dissenting opinion by LEWIS, P.

In the paper filed with the justice in this case, I cannot find any compliance with the statute which requires "a statement of the facts constituting the cause of action." Rev. Stats., sect. 2851. The most liberal construction given to this statute, by the supreme court or by this court, has sustained statements filed before justices of the peace, which would be fatally insufficient in a court of record, in the following classes of cases: — 1. Where the statement filed shows a cause of action, but cumbers it with other causes and matters of complaint in the alternative, thus creating an uncertainty which would not be tolerated in a formal pleading. This is exemplified in *Casey* v. *Clark* (2 Mo. 12), referred to in the majority opinion in the present case. The loss of the plaintiff's horse by improper usage of the defendant is a sufficient cause of action, and is distinctly stated. The confused allegations about other horses and about "imprudent and unauthorized usage," etc., may cast a shade of uncertainty over the statement, but they do not eliminate the cause of action, which is still there notwithstanding. 2. Where the statement does not fully set out the cause of action, with technical particularity, or where it fails to show the manner of its consummation, yet does contain words so referring to the subject-matter of complaint as to convey by implication for what the plaintiff sues. This will occur when the plaintiff, in the form of an account expressing that the defendant is debtor to him, charges the defendant with specified articles of property. The property is the subject-matter of the complaint. The account may not always show in what manner a cause of action has

Digitized by Google

arisen about it, whether by a sale, or by destruction, etc.; but, by a conventional and universal understanding of its terms, it does convey, by implication, to every reader, that the plaintiff has, in some way, been deprived of the property described, and that the defendant has caused the deprivation. Thus the words used *imply* the cause of action. This, again, is exemplified in the cases of *Early* v. *Fleming*, *Pearson* v. *Inlow*, and *Coughlin* v. *Lyons*, commented on in the majority opinion. It thus appears that, in these cases, relied on as sustaining the views of my learned associates, the supreme court had no occasion to find, what I claim to be the fact in the present case, that the cause of action was neither directly stated nor yet implied in the words of the statement. What they excused in the several statements was, that they failed to show some incidental particulars, or the manner in which the injury done to the plaintiff — in other words, the cause of action — took effect. The case of *Burt* v. *Warne*, also relied on, furnishes a still stronger illustration of the same principles. The "damage done to building and premises," etc., was the cause of action, explicitly stated. The technical defect was the omission to state *how* the damage was done. This was excused by the supreme court, as was done in the other cases. The same principles are easy of application to a claim or account for work and labor done; and I am at a loss to understand how the case of *Fitzgerald* v. *Murphy* (9 Mo. App. 572), also remarked on in the majority opinion, contains anything adverse to what is here maintained.

It is thus seen, that in every one of the cases cited — which are presumably the strongest that can be found in aid of the statement here in question — there was wanting only some incident, inducement, or accessory of the cause of action, which technical precision would demand in a formal pleading. But the cause of action itself was there, either by direct statement or by the use of words which, in

Digitized by Google

universal acceptation, *contained* or implied it. In the latter alternative the lack of directness in allegation, being merely a detriment to form, but not to substance, was held not to make the writing any the less a "statement of the facts constituting the cause of action."

In the case before us, the supposed cause of action, if any there be, lies in the fact that the plaintiff has sustained a loss in the compelled payment of money, part of which the defendant ought to have paid, but did not, and which part, therefore, the defendant ought to repay. The facts announced in the statement filed are these:—1. That a judgment was rendered. 2. Its date, the names of the parties, and the name of the justice. 3. Its amount, and the half of its amount, and that it was upon a joint contract. The sum total of all of which is the existence of a certain judgment, as described. Not a word is said about the payment of any money by the plaintiff or by anybody else. In what sentence, word, or letter of the statement is any payment of money implied, or *infolded*, according to the definition? Not one. How can the defendant possibly know or infer from this elaborate history of the judgment that the plaintiff has ever paid a cent upon it? The compelled payment is the cause of action. The judgment is the mere incident or inducement. To say that it is sufficient to state the inducement, without the cause of action, is to reverse the rule of the supreme court, which has always demanded that the cause of action shall somehow appear in the words employed, while the non-appearance of the inducement or other incidents might be excused. In the cases cited, the statements under consideration are sustained expressly on the ground that the *cause of action is implied.* There is no difference of opinion between my learned associates and me as to the sufficiency of implication, when it really appears; but I insist, as the supreme court has practically done, that there can be no implication without words which imply.

Digitized by Google

With all deference, it seems to me that a fundamental error appears in the majority opinion, in the confounding of *implication* with *inference*. A. says: "I never use intoxicating liquors." These words *imply* that he is of abstemious habits. B. says: "I have no appetite." It may be *inferred* from this either that he has eaten sufficiently, or that he is unwell. But neither proposition is *implied* in the words used. If it were, there could be no uncertainty as to which one was true. Inference is deduction; implication is direct expression. The inference comes from our experience and observation of causes and effects, and is not at all *contained* in the words of the speaker. When my learned associates say that the payment of the judgment is implied in the statement before us, I think they mean, that that fact may be *inferred* from the other facts set forth, and from the plaintiff's demand. But, does inference suffice for the statute? Demonstrably, no. When a fact is implied in the statement, it may be said to be contained, or, "infolded" therein, so that the statement is in reality, though it may be obscurely, a statement of that fact. Thus, a statement, *by implication*, of a cause of action, is none the less a statement of the cause of action, and so satisfies the statute. But, if the cause of action must be reached by an inference, that is not a statement of a cause of action, but a statement of something else which leaves the cause of action to be guessed at. This is a thing which neither the supreme court, nor this court, has ever heretofore tolerated, and, which is wholly inconsistent with a law requiring a *statement* of the facts constituting the cause of action. If inferences will suffice, the plaintiff, in a case of assault and battery, need only state that the defendant approached him with a stout stick and a hostile aspect. All the rest may be inferred.

It may be true that the present statement sufficiently implies the presumptive contract for contribution; but it certainly does not imply the breach thereof. The cause of

Digitized by Google

action, if any, is not the contract, but its violation. Of such violation, the statement gives no hint, by implication or otherwise.

The argument drawn from the sufficiency of an ordinary account for a pair of shoes proves nothing. The statute expressly authorizes the filing of an account as the foundation of an action before a justice and thus declares its sufficiency. But, if there were no such statutory authority, it would still be sufficient for manifest reasons. The formula, "John Brown to John Smith, Dr.," has a conventional signification which is familiar to everyone and has been so for centuries. It, of course, *implies* just what it signifies. But no philology can make a mere history of the details of a judgment rendered either signify or imply that any one has paid it.

It is said to be a test of sufficiency in a statement that it will bar another action for the same cause. But surely such a test can be of no benefit to a statement that contains no cause of action at all.

As to the supposed distinction between statutory and common-law causes of action, I do not think that any exists in this connection. The statute which requires a statement of the facts constituting the cause of action applies equally to both. The supreme court has, in numerous instances, where the matter of controversy was even more fully described than it is in the present case, held the statement to be insufficient because, amid all the details of inducement and surroundings, from which much more might be *inferred*, it did not state "the facts constituting the cause of action." *Wathen* v. *Farr*, 8 Mo. 324; *Razor* v. *Railroad Co.*, 73 Mo. 471; *Cunningham* v. *Railroad Co.*, 70 Mo. 202; *Brashears* v. *Strock*, 46 Mo. 221; *Swartz* v. *Nicholson*, 65 Mo. 508; *Gist* v. *Loring*, 60 Mo. 487.

I am of opinion that the statement filed in this case, in its omission to make any reference whatever to the necessary and independent fact of payment of the judgment

Digitized by Google

and in containing no allegation in which such payment would be implied, wholly fails to be what the statute requires. I think it would be difficult to estimate the looseness that may seem to be sanctioned by the present precedent. Surely the line ought to be drawn somewhere, and I can imagine nothing better than to keep it where the statute itself has placed it; so that every statement filed for a suit before a justice of the peace shall be, either by direct expression, or by implication in what is expressed, a "statement of the facts constituting the cause of action." I think that the judgment of the circuit court ought to be reversed, and the cause dismissed.

LAZELLE E. ALEXANDER, RECEIVER, Plaintiff in Error, v. JOHN F. WILLIAMS, SUPERINTENDENT, Defendant in Error.

May 15, 1888.

1. EQUITY—FRAUDS—VOID CONTRACT—INSURANCE LAWS—RESCISSION.— The Columbia Insurance Company and the Life Association being rival companies, the Columbia being embarrassed and harassed by law suits, the Life Association, which owned the majority of the stock of the Columbia, caused the Columbia directory to be wholly composed of directors of the Life Association, and then, by an agreement between the two companies, the Life Association began substituting with the consent of the policy-holders of the Columbia, policies in the Life Association for policies in the Columbia, and assets of the Columbia were transferred to the Life Association for the reserve value of the policies of which the Columbia was thus relieved, and which the Life Association assumed. When this work had progressed to a point at which the Life Association had thus relieved the Columbia of about three thousand policies, the reserve value of which was about $700,000, representing an insurance of seven millions, and assets of the nominal value of $555,000 had been transferred from the Columbia to the Life Association, the Columbia was put into liquidation and a receiver appointed under the insurance laws. Afterwards, the Life Association was put into liquidation. The receiver of the Columbia began this action to avoid the contract between the companies and to recover back the assets transferred.

Digitized by Google

The circuit court, on hearing, dismissed the bill. It is held that this action of the circuit court was warranted by the facts appearing on the trial. The contract between the companies was not necessarily void merely because the directors were the same in both.

2. ——. A transaction made in good faith, whereby an insurance corporation not alleged to be insolvent, having a controlling interest in another corporation, after the demand of a special statement from the latter by the superintendent of insurance, delays that statement, and without removing the assets of either corporation from the reach of the superintendent of insurance, proceeds to reinsure the risks of the second company, absorbing its assets *pro rata* as it assumes its burdens, is not necessarily void as in fraud of the insurance law or as against public policy.

3. ——. It not having appeared that there was any intention to hinder, delay, or defraud the creditors of the Columbia; or that the insolvency of either company was brought about by the transaction, or that the creditors of the Columbia were injured by the transaction, or would have been injured had it been completed; or that the assets transferred for the liabilities assumed were out of proportion to the assets left for the liabilities remaining; or that the contract was oppressive or unfair to the Columbia, or to her creditors or stockholders; the fact that the Columbia's receiver, in the course of subsequent litigation, established a claim against the Life Association of a million dollars for another transaction, as to which, at the time it was made, neither corporation recognized any liability, cannot, by an *ex post facto* operation, be held to show intent to defraud the creditors of the Columbia in the transfer of assets.

ERROR to the St. Louis Circuit Court, THAYER, J.

Affirmed.

JOHN D. POPE, for the plaintiff in error: Where bankrupt laws are in force, the public policy of the government is embodied in the provisions therein made for the surrender and distribution of the assets of insolvents; and every contract and device intended to defeat the full and free operation of these provisions is illegal as against public policy.—*Nerot* v. *Wallace*, 3 Term Rep. 17; *Bell* v. *Liggett*, 7 N. Y. 176; *Downs* v. *Lewis*, 11 Cush. 78; *Dexter* v. *Snow*, 12 Cush. 594; *Austin* v. *Markham*, 44 Ga. 161; *York* v. *Merrett*, 77 N. C. 215; *Claflin* v. *Torlina*, 56 Mo. 369; *Louthan* v. *Stillwell*, 73 Mo. 493. The same is held as to agreements not to plead the statute of limita-

Digitized by Google

tions, or the usury laws, contracts to pay for obtaining signatures to petitions intended to influence the action of a town council, and stipulations in policies of insurance that suits shall be brought only in the state where the charter of the company was granted. — *Crane* v. *French*, 38 Miss. 503; *Clark* v. *Spencer*, 14 Kan. 398; *Maguire* v. *Smock*, 42 Ind. 1; *Reichard* v. *Manhattan Life Ins. Co.*, 31 Mo. 518. The insurance laws of this state in force at the time the transfers in question were made, contain (as does the new act) plenary provisions for the dissolution of insolvent insurance companies, and the surrender and distribution of their assets. They are, therefore, in the largest sense of the term, bankrupt laws for insurance companies, and express unmistakably the policy of the state respecting their dissolution and the disposition of their assets when they have become insolvent, or the further prosecution of their business has become "hazardous to the public, or to those holding their policies. — Wag. Stats. 753, sect. 41; Rev. Stats. 1879, sects. 6037 *et seq*. Accordingly, it has always been held that contracts and conveyances made in violation of these laws, or designed to evade their provisions, or to thwart proceedings of the superintendent of insurance either begun or contemplated under them, are illegal. — *Alexander* v. *Relfe*, 74 Mo. 518, 519; *Price* v. *St. Louis Mutual Life Ins. Co.*, 3 Mo. App. 273; *Relfe* v. *Commercial Ins. Co.*, 5 Mo. App. 173. Every contract entered into between two corporations by means of resolutions or orders adopted by the same persons acting as directors of both corporations, is voidable at the election of either, or of the legal successor of either, and this, without allegation or proof of bad faith or damage. — *Mercantile Mutual Ins. Co.* v. *Hope Ins. Co.*, 8 Mo. App. 408; *Davoe* v. *Fanning*, 2 Johns. Ch. 251; *Drury* v. *Cross*, 7 Wall. 299; *Koehler* v. *R. R. F. Iron Co.*, 2 Black, 715; *Jackson* v. *Ludeling*, 21 Wall. 616; *Wardell* v. *Railroad*

Digitized by Google

Co., 103 U. S. 651; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Grumley* v. *Webb*, 44 Mo. 451; *Thornton* v. *Irwin*, 43 Mo. 153; *Gaines* v. *Allen*, 58 Mo. 537; *St. Louis* v. *Alexander*, 23 Mo. 483; *Lingle* v. *National Ins. Co.*, 45 Mo. 109; *McAllen* v. *Woodcock*, 60 Mo. 180; *Kitchen* v. *Railway Co.*, 69 Mo. 224; *Chouteau* v. *Allen*, 70 Mo. 338. But the transfers in question could not be upheld even if it were conceded that the insurance law and the fact that the identity of directors had no weight, because if the directors had the right to wind up the company, it being insolvent at the time, all the assets became a trust-fund for creditors. The equitable lien of creditors upon the corporate assets, is for the benefit of all the creditors equally. — *Price* v. *St. Louis Mutual Ins. Co.*, 3 Mo. App. 262; *Relfe* v. *Commercial Ins. Co.*, 5 Mo. App. 173, 185; *Curran* v. *Arkansas*, 15 How. 304; *Sawyer* v. *Hoag*, 17 Wall. 610; Bump's Fr. Conv. (2d ed.) 189; *Drury* v. *Cross*, 7 Wall. 303; *Henderson* v. *Henderson*, 55 Mo. 555; *Ames* v. *Gilmore*, 59 Mo. 543.

HORATIO M. JONES, for the defendant in error: There must be some "covering up," some "giving the debtor a secret interest," or some "locking up for the debtor's own use and benefit," to avoid the transaction. All the cases sustain this view. The case of *Henderson* v. *Henderson* (55 Mo. 536) was one of a transaction merely colorable. It was not a case of a preference at all. — *See Ensworth* v. *King*, 55 Mo. 477; *Simpson* v. *Dall*, 3 Wall. 461; *Chamberlain* v. *Billsbury*, 35 Vt. 16; *Darrill* v. *Terry*, 6 Hurl. & N. 807; *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492; *Alton* v. *Harrison*, 38 L. J. (Ch.) 669; *Sutton* v. *Bath*, 1 Fost. & Fin. 152; *Holbird* v. *Anderson*, 5 Term Rep. 235; 2 Moo. & R. 439; 7 Q. B. 892; *Prior* v. *Kenney*, 6 Munf. 610; *Clark* v. *Douglass*, 62 Penn. 408; *Sewall* v. *Russell*, 2 Paige, 175; *Weir* v. *Hale*, 3 Watts & S. 285; *Bailey* v. *Barton*, 8 Wend. 339; *Mitchell* v. *Beal*, 8

Digitized by Google

Yerg. 134; *Barrett* v. *Union Bank*, 5 Humph. 612; *Drury* v. *Cross*, 7 Wall. 299; *Michael* v. *Gay*, 1 Fost. & Fin. 409.

W. S. RELFE, for the defendant in error: One who seeks to avoid or rescind a contract "must put the other party in the condition that he would have been in had the contract not been made," and if this cannot be substantially done, there can be no rescission.—*Jarrett* v. *Morton*, 44 Mo. 277; *Woods* v. *Straup*, 63 Mo. 438; *Moyer* v. *Shoemaker*, 5 Barb. 319; *Wheaton* v. *Baker*, 14 Barb. 594; *Matteawan Co.* v. *Bentley*, 13 Barb. 641.

BAKEWELL, J., delivered the opinion of the court.

The second amended petition in this case, after setting forth that the Columbia Life Insurance Company was a dissolved corporation of which plaintiff is the receiver, and that defendant, as superintendent of the insurance department of Missouri, has charge of all the assets of the Life Association of America in liquidation, that corporation being also dissolved, proceeds to make allegations of transactions between the two corporations during their existence, and of certain transfers of property from the Columbia to the Life Association, and concludes with a prayer that these transfers be declared fraudulent and void; that the title to the property in question, and to the proceeds, be vested in plaintiff, and for an account and a delivery of possession to plaintiff.

The list of personalty and real estate transferred is very long. It consists of real estate alleged to be worth $311,376.84, and real estate loans, bills receivable, accrued interest, premium loans, and deferred premiums, set out as worth, together, $364,367.54, making a total of property, real and personal, worth $675,744.38.

In the petition as originally filed, there were allegations showing that these transfers were called in question by plaintiff on three grounds: 1. Because they were made

Digitized by Google

between the companies by officers and directors incapable of making any agreements for a transfer between the companies, for the reason that the directors of the Columbia, at the time, were, all of them, directors of the Life Association; 2. Because these transfers were made with the intent of defeating the state laws as to insolvent insurance companies, and specially to thwart proceedings already begun by the superintendent of insurance to put the Columbia in liquidation; 3. Because these transfers were made with intent to hinder, delay, and defraud the creditors of the Columbia, and were therefore void under the statute.

On motion of defendant, allegations of the petition as to the intent to defeat the operation of the insurance laws of the state, to evade their provision, and thwart proceedings begun or contemplated by the superintendent of insurance, were stricken out from the petition. Other parts of the petition were also stricken out; but as evidence as to these other allegations was freely introduced on the trial, the action of the court in striking out these last-named allegations is not made a subject of complaint here.

The answer specifically admits many allegations of the petition, and denies others. To give the substantial allegations, admissions, and denials in the pleadings, is impracticable, owing to their length. The answer in conclusion, pleads as an estoppel that plaintiff recovered a judgment for over a million dollars against the Life Association, which was declared a lien upon all its real estate in the city and county of St. Louis; that some of the real estate described in the petition was subject to this lien; that a number of pieces included in the transfers to the Columbia were sold, and the proceeds, by order of the court, paid over to plaintiff, who received the same. The answer also sets up a counter-claim for $700,000, on account of excess of aggregate reserves on policies surrendered to the Columbia over the values received therefor

Digitized by Google

from the Columbia by the Life Association. There was a general denial to all the new matter in the answer.

On hearing, the issues were found in favor of defendant, and the bill was dismissed.

This action was begun on December 27, 1877, against the Life Association of America. On December, 1, 1879, the dissolution of defendant was suggested, and the superintendent of the insurance department was afterwards substituted as defendant.

It appears that the Mound City Life Insurance Company had been doing a large business in life insurance before February, 1874. At that date, it changed its name to the "St. Louis Life Insurance Company," which, in January, 1876, changed its name to the "Columbia Life Insurance Company." The company remained the same. The Mound City, in January, 1874, reinsured the risks and assumed the obligations of the St. Louis Mutual and of the Missouri Mutual, two life insurance companies. In February, 1874, the Mound City reinsured some risks of the DeSoto Mutual Life Insurance Company. The St. Louis Mutual had reinsured the risks of the Atlas Mutual before its own risks had been insured by the Mound City.

For a period before any of these dates, the Life Association of America and the Columbia, under its various names, had been conducting a life insurance business, on a large scale, their policies extending over the United States; their chief offices being at St. Louis.

On February 22, 1877, the insurance superintendent began formal proceedings against the Columbia to put it in liquidation. In August, 1877, the Columbia was put into the hands of a receiver: and, in October, 1877, there was a final decree of dissolution against that company. The Life Association continued in active business until October, 1879, when proceedings were begun against it by the superintendent of insurance, which resulted in a decree of dissolution, on November 10, 1879.

Digitized by Google

In 1875, the Life Association and Columbia Life, being rival insurance companies, having a large business extending through the same territory, the managers of the Life Assotion, thinking that a purchase of a controlling interest in the Columbia would be for the benefit of the Life Association, purchased a large majority of the stock of the Columbia, so as to obtain a controlling vote in that company. The charter of the Life Association required fifteen directors, each of whom must be insured in that association for at least $10,000. It was a mutual, and not a stock, company. The Columbia was a stock company, with eleven directors, by its charter, each of whom must own ten shares of its stock. Portions of the stock of the Columbia were transferred by the Life Association to certain of the directors of the latter association, who were then elected directors of the Columbia, thus entirely replacing the old board. All the directors of the Life Association were not directors of the Columbia, but all the eleven directors of the Columbia were directors of the Life Association. When this was effected, negotiations for consolidating the two insurance companies began.

On October 11, 1876, at a special meeting of directors of the Columbia, the president stated that, on account of the excessive mortality in the company, especially among policy-holders of the St. Louis Mutual Life, and the manner in which the Columbia was persecuted by law suits, and to preserve the interests of the policy-holders, the board was convened to consider the propriety of authorizing the executive committee to take action towards the transfer, with the assent of the assured, of each policy of the Columbia to the Life Association, that the business might be consolidated, and the expense of separate management saved. After a report from the actuary, and a discussion as to the mode of effecting these transfers, and the time required, the executive committee was by resolution authorized to receive from the Life Association the surrender of

Digitized by Google

all policies issued by the Columbia, St. Louis Life, Mound City Mutual, Mound City Life, St. Louis Mutual, and Atlas Mutual, which may be assigned to the Life Association; the Columbia to pay to the Life Association, for the surrender of such policies, their value, based upon a valuation made on the American table of mortality, with six per cent interest, and any further sum that the company's sworn statement for the year ending December 31, 1876, to the insurance department, may show to belong to such policies respectively; payments to be made with assets of the Columbia, real and personal, and the president and secretary to execute the necessary deeds.

On December 30, 1876, at a meeting of directors of the Life Association, six of these directors being part of the nine directors at the preceding meeting of the Columbia, it was stated by the president that a number of persons holding policies in the Columbia and other companies named in the proceedings of the last meeting, had assigned their policies in exchange for policies in the Life Association; that he had furnished a list of these to the Columbia, requesting that arrangements be made for their purchase, and had received a copy of the resolution set forth above. It was then resolved that the insurance committee of the Life Association be authorized to surrender to the Columbia all policies issued by that company and the other companies named above, which had been assigned to the Life Association, and for which it had agreed to issue policies, on payments to the Life Association, by the Columbia, of the reserve, according to the terms of the resolution set out above.

On December 28, 1876, at a meeting of the directors of the Columbia Life, the president was empowered to execute deeds for certain parcels of real estate, valued on the books of the company at $117,350, and to transfer certain notes secured by real estate, of the full value of $225,367.65, and certain bills receivable amounting to $2,438, in payment on

Digitized by Google

account, for surrender of two thousand, one hundred and eighty-seven policies, under the arrangement between the companies.

This was the chief transfer of assets and surrender of policies; but similar transfers and surrenders were authorized and made on January 22, February 16, and February 21, 1877. The total charged to the Life Association by the Columbia for transferred assets was $554,762; of which $305,876 was for real estate, the balance for personalty. The total number of policies surrendered, was nearly three thousand; of the net value of about $700,000; of which value about $300,000 was paid-up policies. The amount of insurance for which the Life Association thus became responsible, was over seven millions; the immediate liability, at the purchasing value of the policies, being about one-tenth of this.

It was admitted at the trial that the amounts insured by the policies given by the Life Association in exchange for the policies of the Columbia and the other companies for which the Columbia was responsible, were about the same amount as those insured by the surrendered policies.

Before the matter was ripe for action of the boards of directors upon the transfer of assets and exchange and surrender of policies, each policy-holder had to be seen, the condition of each policy had to be examined, and the consent of the policy-holder to be obtained in each case, calculations to be made, and policies to be written, all which was a work of time. The policies were classed by localities, and the policies valued. This was done under the supervision of Smith, an actuary in the employ of the Columbia. Smith is a witness for defendant, and he states that the matter of the transfer was begun in October, and went on during about four months. No selections as to individuals were made at any time; the policies were taken up in groups according to localities, so as to suit the convenience of the

Digitized by Google

agents. No medical or other examination was required, and no distinction was made as to state of health. The instructions to the actuary were, that the risk and assets to be transferred were to be proportionate, each to each; and, on each transfer, the Life Association was to be credited with the valuation of the policy by the American tables with interest at six per cent; the surplus was to be adjusted in final settlement between the companies, which was never had.

The deposition of Williams, employed by the Life Association to solicit these assignments of policies was read on behalf of plaintiff. He corroborated Smith as to there being no discrimination as to bad risks and no new medical examination. He says that the Life Association recognized the full value of policies exchanged; if the policy was premium-paying, the exchange was even; if paid up, a six per cent reserve was allowed. The policy-holder was placed in the Life Association on the same footing that he had in the Columbia. If the insured had paid premiums to the Columbia for six years, the new policy was dated on the day it was issued, but was accompanied by a paper showing the transaction, and that it was to stand in all respects as to forfeiture and commutation as a policy of six years' standing. This witness further states that no difference was made as to terms from the locality of the insured and the comparative sanitary state of the place of their residence, as being north or south. Plaintiff introduced a letter from Dunlap, president of the Columbia, to Williams, in which he speaks of the litigation against the St. Louis Mutual, and the duty of the Columbia to defend these actions, and goes on to say, that, in view of the difficulties arising from the old business of the St. Louis, Atlas, and Missouri Mutual, it has been determined to give all policy-holders an opportunity of surrendering their policies in exchange for new policies in the Life Association; that, within certain geographical limits (which are not defined), policies in all the companies, except St. Louis and Atlas, would receive new

Digitized by Google

insurance for the same amount; that the death losses under St. Louis and Atlas policies have been so far above the death rate, that an equal amount of insurance could not be granted in exchange for their policies, but an amount as large as safe would be offered; that nothing can be done in the matter without the consent of the policy-holder; and that the writer thinks the proposition one that they would do well to accept. There were also letters introduced from agents employed in effecting this reinsurance, tending to show a desire to discriminate against the policies of the St. Louis Mutual, and where the death rate had been found excessive. But it is not shown that such discrimination was made. It is suggested in argument that these letters were written to create an impression that might allay apprehensions of imprudent action on the part of the Life Association. Williams, in a letter to a policy-holder in Little Rock, writes that "all desirable business" to the Columbia Life and other companies is being transferred to the Life Association, and that this ought to be to the advantage of the latter company. McBeth who was agent of the Life Association for effecting these reinsurances, writes in January, 1877, to a person in Selma, Alabama, that the Life Association will grant policies in exchange as per tables sent, and says:—"If you can succeed in having any of these parties take new insurance the company will pay a cash commission of fifteen per cent on premiums of new policy." But we see no evidence that any such commission was paid to agents effecting the changes made. No St. Louis Mutual death losses were paid after December 1, 1877. Among the assets of the books of the Columbia were some nearly worthless; a furniture account of $50,000, worth perhaps $5,000, claims against defaulting agents and others, nearly $170,000 perhaps worth nothing. These were not amongst the assets transferred to the Life Association in exchange for policies. The St. Louis Life building was valued on the books of the Columbia at $1,000,000. It was mortgaged for $400,000. It was

Digitized by Google

sold under the mortgage at $280,000. Real estate experts place its value at from $400,000 to $600,000; this remained amongst the transferred assets of the Columbia, and it is contended that, whilst a six per cent reserve was taken by the Life Association for the policies surrendered, the assets left would not have furnished six per cent reserve on all the policies had the business of reinsurance been completed, that there was not a six per cent reserve left for the policies which the Life Association did not acquire.

It is manifest, however, from the testimony, that the assets taken by the Life Association for the transfers made were not worth their face value, nor the sums at which they were rated on the books of the Columbia, nor the sums at which they were charged to the Life Association. It is impossible to go into details of the testimony as to this. Putting out of sight, however, the question of the lien upon most of this property, subsequently established against the Life Association in favor of the Columbia, it seems probable that the assets, real and personal, transferred at a nominal value of half a million dollars, were not worth more than half that amount, and it is not clear that the remaining assets did not bear the same proportion to the value of the untransferred policies. The building remained. It was unwieldy property to deal with or to dispose of. But though it actually sold at a forced sale for cash at $280,000, it was worth twice that sum according to the estimate of real estate men. The Columbia was insolvent after these transfers were made, as she was before; but, on February 28, 1877, when she ceased to do business, her policy liability was about $3,700,000, and her total liability about four millions, and her assets as shown by her books, were nearly three millions and a half, of which the real estate and real estate loans make up nearly a million, and the remaining $2,500,000 of premium loans, collateral loans, stocks, and bonds, were probably not worth any large percentage of their face value. But if these assets represented only forty per cent of the remaining policy liability of the Columbia, the assets transferred to the Life

Digitized by Google

Association do not seem to have been worth more than forty per cent of the liability which it assumed.

The result of these transfers of assets and surrenders of policies was, that, in February, 1877, when the superintendent of insurance began proceedings in court to put the Columbia into liquidation, the Life Association had taken up and surrendered to the Columbia nearly three thousand policies, representing over seven millions of insurance, the surrender value of these policies being over $700,000, in consideration of which the Life Association had received from the Columbia assets of the nominal value of less than $700,000, and of a real value of less than half that sum. The Life Association was then in good credit and standing, and the Columbia was insolvent, though its insolvency was not brought about by these transactions.

The Columbia, however, through her receiver, established a claim against the Life Association for over a million of dollars, on account of an alleged conspiracy of certain officers of the Life Association, by which it was said, that a certain draft for $900,000 was yielded up to the Life Association, in exchange for shares of the capital stock of the Columbia. This claim was first set up by the receiver. Judgment in favor of the receiver of the Columbia was rendered in the circuit court of St. Louis, on October 13, 1879. On appeal, this judgment was reversed by this court, on the ground of want of capacity in the receiver to sue, and on the further ground that no unlawful act was alleged or shown. This judgment of reversal was reversed by the supreme court, which, however, required plaintiff to enter a *remittitur* of $130,000 for the value of Columbia stock received. The judgment being thus reinstated of its original date, the receiver of the Columbia moved the circuit court to declare this a lien on all the real estate owned by the Life Association in Missouri at the original date of the judgment. This was in 1882, when the Life Association was also in liquidation, and the present

Digitized by Google

defendant had charge of its assets. The real estate in question was mainly that acquired of the Columbia in the transactions above set out. The superintendent of insurance had reported to the circuit court the sale of almost all this real estate, as well as the amounts realized from the other assets transferred to the Life Association by the Columbia. The circuit court sustained the motion so far as a lien was claimed upon real estate in the city and county of St. Louis; and, it appearing that the superintendent had $72,350, proceeds of the sale of such real estate on hand as assets of the Life Association, he was ordered to pay this and two notes for $1,712 for deferred payments for such sales, to the receiver of the Columbia, which was done, and credited upon the judgment.

It may be observed that counsel for appellant, during the trial, conceded that the directory of both companies acted in good faith in the matter of this scheme for reinsurance and transfer of assets, and that there was no actual fraud in the matter. It is a well-settled principle that one person cannot act in a trade in two positions which impose different obligations which would raise a conflict between interest and duty. Directors of corporations and all persons acting in a fiduciary capacity are subject to this rule. It would follow that the same persons ought not act as agents of different companies in their mutual transactions where the interest of the several companies would be opposed, and it would be the duty of the agents of each company to favor it at the expense of the others. Nevertheless we have found no case where it has been held that a transaction between two corporations is void merely because all the directors of one corporation were also directors of the other. On the other hand, it has been held that a contract of a corporation is not rendered void by the fact that some of the persons assisting to make the contract, and taking part in the performance of conditions, and in acceptance of performance, were officers in both corpora-

Digitized by Google

tions and represented both to the extent of their respective powers. And where the mayor of a city was also president of a railroad corporation, and the mayor and corporation had passed an ordinance authorizing the mayor to subscribe four hundred shares of stock in the railroad and to issue bonds for the payment of the same, and the mayor submitted the question of subscription to the voters, the subscriptions and bonds were held to be valid. *Mayor* v. *Inmann*, 57 Ga. 370. We cannot see that the fact that there were no directors of the Columbia not also directors of the Life Association, materially changed the principle involved, or makes the case worse for the contract than if there had been some directors of each corporation who were not directors of both.

The directors who did contract with each other would not be more competent to contract for having some co-directors not interested in the other company. The contract between the North Missouri Railroad Company and the St. Louis and North Missouri Company was not held void by the supreme court, though the St. Louis and North Missouri Company was formed to purchase the road by obtaining control of the railroad company, and the association named the majority of the directors of the railroad company. *Kitchen* v. *St. Louis, etc., Ry. Co.*, 69 Mo. 224.

In fact we know that during the litigation which has grown out of these insurance matters in the last few years, contracts between the Columbia and the Life Association, made between directors common to both, have been considered by this court, and by the supreme court, and the capacity to contract has been taken for granted by the courts and never called in question, but assumed by the learned counsel who now represents the plaintiff. *Alexander* v. *Relfe*, 9 Mo. App. 133. And, in the petition in this cause, whilst setting up this identity of directors, the pleader asserts that a contract was made, which he seeks to avoid for fraud. The contract was, in effect, a series of successive steps towards

Digitized by Google

the consolidation of the two companies; it was being effected, as the consent of policy-holders could be obtained and new policies written, by taking which the policy-holders would give up their equitable lien on the assets of the company with which they had first contracted, and look to the company to which their assets were being gradually and *pro rata* transferred. No injustice was done to either corporation, or to creditors, so long as a due proportion was observed between the assets transferred and the liabilities cancelled by one company, and assumed by the other. Nor does the transaction between the companies appear to us to be necessarily void as in fraud of the state laws in regard to insurance and the public policy of the state as indicated by these laws. In *Relfe* v. *Commercial Insurance Company* (5 Mo. App. 173), the attempt was by an insolvent insurance company admitting its insolvency, to assign all its assets, and, by this means, to evade the process of winding up insolvent insurance companies provided, by the statute, and to withdraw the assets of the company from administration by the officers whose duty it was by law to investigate its affairs and control the liquidation. This, we held, could not be done. But the case is different where a corporation, not alleged to be insolvent, having the controlling interest, through ownership of its stock, of another corporation, after the demand of a special statement from the latter corporation by the superintendent of insurance, delays the delivery of that statement, and without removing the assets of either corporation from the reach of the superintendent of insurance proceeds to reinsure the risks of the second company, absorbing its assets *pro rata* as the burdens of the second company are by degrees shifted to the shoulders of the first. It was not alleged in the present case that this process created insolvency in either of the corporations.

Nor do we see any satisfactory evidence of any intention to defraud, delay, or hinder the creditors of the Columbia for which the transaction should be set aside. Had the

Digitized by Google

scheme been carried out as intended, so far as we can see from the evidence, there would probably have been no policy-holders of the Columbia and few creditors, by the time the assets had been completely transferred; nor does it appear that the execution of the scheme would have injured any one who had a claim against the Columbia.

But it is contended that, if the agreement between the companies was not void, it ought to be set aside if it appears that one corporation exercised an undue influence over the other, or an improper control, or that the contract was oppressive, unequal, or unfair as between the corporations, or to creditors, or stockholders of either; and in this connection it is insisted that the Life Association, at the time of the agreement, really owed the Columbia $900,000, for which the receiver of the Columbia afterwards established its claim. Neither corporation seems to have recognized any such indebtedness, which arose from a transaction in which there was a purchase of assets with a draft on the Life Association accepted by it, a substitution of drafts, and, at last, the change of a draft for nominal equivalent of stock in the Columbia, all which took place two years before the transactions now in consideration. The claim set up by the receiver, and successfully resisted in this court, can hardly, by an *ex post facto* operation, be held to show a fraudulent intent as to the creditors of the Columbia in the transfer of assets now under consideration. The evidence tends to show that, in receiving these assets, the Life Association relieved the Columbia and helped its creditors, and that was the intention of the directors; that the burden assumed by the Life Association was largely in excess of the assets received by it, and that the burden which the Life Association assumed was lifted from the Columbia.

But, in any view that may be taken of the evidence, or the law as to void and voidable conveyances, fraudulent assignments, and the powers and duties of directors and agents of the corporations, we do not see that this is a case

Digitized by Google

for equitable interference, or that a court of equity can give any relief.

So far as the real estate is concerned, it appears that the receiver of the Columbia has almost all of it already, under his judgment, and that, at the time that this case was ripe for a decree of the circuit court, the defendant had no title to the greater part of the assets which plaintiff claims; that the title and possession were already in the plaintiff. It appears that the total net proceeds of the assets received from the Columbia which had come into the hands of the superintendent of insurance, on January 30, 1882, was $105,403. The Thornton real estate has already been adjudged to plaintiff under his lien. It does not appear that there is much more to be made by the superintendent out of the property transferred. A rescission would leave about $45,000 to be turned over by defendant to plaintiff, and plaintiff would be entitled to a general judgment, in addition, for the remaining assets, valued on the books of the Columbia at about $300,000; and, if we are to be guided as to their real value by the amount realized upon the other transferred assets, not worth probably half that sum. But the Life Association has put itself into the shoes of the Columbia for a liability of about $700,000—the reserve value of the Columbia policies which the Life Association has taken up and surrendered to the Columbia. The Columbia does not deny that these were outstanding liabilities of hers which the Life Association bought up. The Columbia is not to get back her assets, and remain discharged of the liability which those assets were intended to secure. If she gets back her assets, she should pay the obligation which the Life Association assumed in consideration of these assets. Then there ought to be a general judgment in favor of the Life Association for some $700,000—certainly for more than enough to swallow up any special and general judgments in favor of the Columbia. This sum defendant's counsel admits that the Life Association is entitled to, but

Digitized by Google

he says it should be allowed against the receiver of the Columbia, as any ordinary policy claim to be paid *pro rata* with other policy claims. This certainly would not put the parties in the condition in which they would have been, had no contract been made. The Life Association has assumed $700,000 of liability of the Columbia, besides paying out cash for death losses; this liability it still has, and from this liability the Columbia is relieved. All the consideration received for assuming this liability is to be surrendered, and though the Columbia, in liquidation, has never paid a dividend, the Life Association is to take its chances of a general dividend to repay it for assuming the entire policy liability of the Columbia.

So far as we are able to see from this large record, and from the arguments and briefs of counsel, the Life Association, in these transfers and this reinsurance, made a bargain burdensome to it and beneficial to the Columbia. It does not satisfactorily appear that the arrangement was made with intent to hinder, delay, or defraud creditors of the Columbia, or that it must have, or would naturally have, that effect; nor that the transaction was made to remove the assets of the Columbia from the jurisdiction of the superintendent of insurance. The contract is executed; and it is not even claimed that the directors, in making it, contemplated any fraud upon the directors of either corporation, nor do we see that the creditors of either corporation are losers by the contract. No rescission can now be made that would put the contracting parties in *statu quo;* nor can we conceive of a decree that would at all approach such a consummation; and any interference now, looking to a rescission, would be merely to make confusion worse confounded, without, so far as we can see, tending to establish any legal or equitable claims of these companies or their creditors.

We are of opinion that the judgment of the circuit court ought not to be disturbed. It is so ordered.

All the judges concur.

Digitized by Google

JAMES S. HANNON, Respondent, v. F. F. LOGAN ET AL.; CHARLES GIBSON, Appellant.

May 15, 1883.

1. **AMENDMENTS — PLEADINGS — LIENS. — In actions on mechanic's liens, the power of amendment of pleadings will be liberally exercised to save a limitation.**
2. **MECHANIC'S LIENS. — Though a contract is necessary to the establishment of a mechanic's lien, the lien is created, not by the contract, but by furnishing the materials and doing the work.**
3. **—— It is immaterial whether the contract between the contractor and the sub-contractor was to do the work on two houses for a given sum, or to do the work on each of the two for one-half of that sum, if the work done on one was done by actual count and measurement.**

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

RUDOLPH SCHULENBURG, for the appellant.

TAYLOR & POLLARD, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The amended petition in this case alleges that Augusta A. and Floyd F. Logan, husband and wife, contracted with defendant Gibson to erect a dwelling-house and stable upon a lot of ground described, owned by Gibson; and that plaintiff contracted with the Logans to furnish the copper guttering and tin spouting upon these buildings; and did furnish the same, both as to work and materials, which were reasonably worth $137.50; which amount the Logans agreed to pay plaintiff for this work and these materials. The petition sets out the particulars of the work, and the necessary averments as to dates, description, ownership, notice, and filing of the lien; and asks judgment against F. F. Logan, and that the same be declared a lien, etc.

The answer, after a general denial, sets up that plaintiff entered into a contract with the Logans to furnish all the

Digitized by Google

copper and tin spouting necessary to complete two two-story houses according to plans and specifications; that one of these houses, with the ground, belonged to the Logans, the other to Gibson; that the contract was entire, and not divisible; that, under the contract, plaintiff furnished work and materials to the two houses indiscriminately to an amount and value unknown to Gibson; that part was put into one house, and part into the other, and plaintiff kept only one account of the work and labor done on the two houses, considering the whole as one job and contract; that defendants, the Logans, paid plaintiff a part of the demand for the work done under the contract, the amount of this payment being unknown to defendant.

The reply was a general denial of the allegations of the answer.

There was a default as to the Logans; and subsequently the action was dismissed as to Mrs. Logan. There was a verdict and judgment for plaintiff establishing the lien.

The mechanic's lien in evidence, states, that the various items of the account, the sum of which is $137.50, were furnished under a contract by which Hannon agreed to furnish all the material and do the copper guttering and tin spouting on Gibson's house and stable, and also to furnish the like amount of material and do the like amount of copper guttering and tin spouting on a like dwelling-house and stable belonging to the Logans, "said dwelling-house being under one roof, and the contract for furnishing all of said material and doing said labor was one and entire, for the agreed price of $275. The two dwelling-houses form one solid row; and one of the stables is used in connection with, and belongs to, one of said dwellings, and the other stable to the other dwelling-house."

Plaintiff testified that, at the request of Logan, he made a verbal bid to do the copper and tin work on the Logan house and stable for $137.50, and on the Gibson house and stable for $137.50, or to do both for $275. This bid was

Digitized by Google

made after the witness had estimated the items of work and materials on measurements and calculations made by him. The bid was accepted by Logan. The work was done by plaintiff. The bill of particulars in the lien is correct, and the prices charged were the reasonable value of the work and materials at the time. After the work was done, the witness ascertained by actual measurement that the work and labor and materials charged were actually furnished by him to the Gibson house. The copper was twenty-inch twelve-pound copper. The contract was not for $275, for the two houses, but for $137.50 for each. The charge of fifty cents for nails was not ascertained by separately weighing the nails used in each house, but by a calculation that half of the whole quantity of nails furnished must have gone into each house.

Plaintiff withdrew from the consideration of the jury, the charge of fifty cents for nails.

Plaintiff introduced in evidence the original petition, which was filed within the time limited by law. The allegations of this petition were to the effect that plaintiff made a contract with the Logans to do the coppering and tin spouting on two dwelling-houses and stables, contiguous to each other, under the same roof, and forming a solid row; that the eastern house belonged to the Logans, and the western house to Gibson; that the Logans had contracted with Gibson to erect his house and stable; that plaintiff, under his contract, furnished the guttering and spouting on the two houses and stables, which was reasonably worth $275; that each house and stable required an equal amount of material and labor; that half of the material and labor was furnished upon the house and stable of Logan, and the other half on the house and stable of Gibson; that plaintiff filed his contractor's lien on the Logan premises for one-half of the claim, and his sub-contractor's lien on the Gibson premises for the other half of the total work and materials. The demand, with its several items, is set out

Digitized by Google

as an entire claim of $275; and judgment is prayed against the Logans for one-half of this, and against the Gibson premises for the other half.

Defendant objected to the oral testimony introduced by plaintiff on the ground that it was incompetent and irrelevant, and at variance with the lien and the allegations of the original petition. The ownership of the premises, and the contract of Gibson with the Logans, was admitted. Defendant offered evidence tending to show that the copper claimed to be twenty-inch copper, was only seventeen inches wide.

Defendant Gibson asked an instruction in the nature of a demurrer to the evidence; and also instructions, that, if the jury find that the copper was only seventeen inches wide, plaintiff cannot recover; that if they so find, there can be no recovery for the copper; and that, if they so find and further find seventeen-inch copper to be worth less than twenty-inch copper, they must find for defendant as to that item. These instructions were all refused.

1. Though the amended petition was filed after the expiration of the time for beginning the action upon the mechanic's lien, the cause of action, that is the labor done and materials furnished, were substantially the same in both petitions. The first petition was not an absolute nullity; and the lien is not created by the petition, which is a proceeding to continue and enforce the lien. The decisions are in favor of a liberal exercise of the power of amendment to save a limitation; and where the rights of third persons are not injuriously affected, go to considerable lengths in treating an existing proceeding as a stock whereon to graft an amendment. Where it did not appear in the first petition that the labor and materials were furnished in conformity with the original contract (*Broderick* v. *Poillon*, 2 E. D. Smith, 554; 1 Abb. Pr. 319); where no judgment had been asked for a lien (*Lackner* v. *Turnbull*, 7 Wis. 105); where a new contract was set out in the amended petition

Digitized by Google

(*Phœnix Ins. Co.* v. *Batchen*, 6 Bradw. 621); where the realty was misdescribed (*O'Leary* v. *Burns*, 53 Miss. 170); or insufficiently described (*Duffy* v. *Brady*, 4 Abb. Pr. 432; *Mann* v. *Schroer*, 50 Mo. 306); the plaintiff has been allowed to amend.

2. The lien is created, not by the contract but by furnishing the materials and doing the labor. The contract relation existing between the owner and the original contractor must exist, of course; but this was alleged and shown. It is immaterial whether the contract between the original contractor and the subcontractor was to do the entire work upon the two houses for $275, or the work on each house for $137.50, since the evidence was that the work and labor set forth in the account went, not by guess work, but by actual measurement, into the defendant's house. This objection was considered and disposed of in *Hayden* v. *Logan* (9 Mo. App. 492), and we adhere to the views which we expressed in that case. That case was decided with complete advertence to what had been decided, and what had been said in *Schulenberg* v. *Robinson* (5 Mo. App. 564), where we laid down the principle that the person filing a mechanic's lien can not so mingle his claim with other claims as to necessitate a process of separation by the courts, or bring into the suit against the owner issues with which he has nothing to do. That principle is not violated where the lien sets forth that the contract was to do certain work on one house and the same work on another house, both houses being under one roof, and that the contract price for the whole work was a certain sum, and the sum of the items in the lien aggregates one-half of that sum, and the petition claims that the work done on defendant's house was worth the sum set forth in the lien, which amount the contractor agreed to pay, and the evidence is, that the bids accepted, after estimates on each house, was a certain sum for each house, and twice that sum for both houses, and that the work and labor, at the contract price, actually, by

Digitized by Google

measurement, went into the defendant's house and was worth the amount charged. There is nothing in the present case tending to show that the amount and value of the work and labor on defendant's house was guessed at by measuring and estimating the work on both houses and dividing the result by two.

If ten men own contiguous houses in a row, each owning one house, and the man who has the contracts for building these houses agrees with a painter, the houses being in all respects alike, to paint each house for $100, or the whole row for $1,000, and the subcontractor files a lien against one house for $100, for painting under this contract, and shows by actual measurement that one-tenth of the whole work went into this house, that the painting was reasonably worth $100, and was worth $100 under the contract, no reason appears why he may not then establish his lien against the one house. The owner can not be prejudiced. If the contract was an entirety and the contractor can defeat the claim, and the owner the lien, for any failure as to any other house of the ten, that is to the advantage of the owner. If the work can be done cheaper on each house where there are ten together, and the contract is to paint ten, that is also to the advantage of the owner. If there was a contract to do a certain piece and definite amount of work on the owner's house for a defined and reasonable price, and that work was done, the owner is not hurt because other work on other houses was done under the same contract.

We see nothing of which defendant can complain. The instruction given for plaintiff was unexceptionable. The instructions refused, were properly refused. There was no evidence that seventeen-inch copper was worth less than twenty-inch copper. The instructions given, required the jury to find that the work was according to contract in all respects; and there was evidence tending to show that the copper was twenty-inch, as called for by the contract.

The judgment is affirmed. All the judges concur.

Digitized by Google

THOMAS W. DYER ET AL., Appellants, *v.* FRED. KRACKAUER, Respondent. 14 39 / 42 541

May 15, 1883.

1. ACTION TO QUIET TITLE — POSSESSION. — In a proceeding, under the statute, to quiet title, there can be no proof of title for the purpose of raising the legal presumption of possession.

2. —— In such a proceeding a mere legal presumption of constructive possession will not satisfy the statute.

3. —— A plaintiff who has such a possession as will prevent him from maintaining ejectment, may maintain an action to quiet title.

4. —— The fencing of land may be a trespass, and is not conclusive of possession in an action to quiet title.

5. EJECTMENT — DISSEISIN. — One whose enjoyment of real estate is unlawfully interfered with by the entry of another with intent to hold as owner, may elect to treat the latter as a disseisor, and may maintain ejectment.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

E. P. JOHNSTON and THOMAS A. RUSSELL, for the appellants: This is an action at law, in the strict sense of the term, under the statute, section 3562 (*Harrington* v. *Utterback*, 57 Mo. 519 and 521), and is distinct from an equitable action, examples of which are to be found in *Taylor* v. *Ulrici* (19 Mo. 89) and *Pattison* v. *McCamant* (28 Mo. 210). The court erred in excluding the evidence of title offered by appellants, as the statute specifically required them to set forth their estate, showing that it was at least an unexpired term of ten years, and they could not have recovered without evidence of possession and title to that extent. — *Campbell* v. *Allen*, 61 Mo. 581; *Bredell* v. *Alexander*, 8 Mo. App. 110; *Brown* v. *Matthews*, 117 Mass. 506. The possession must be a *pedis possessio*, defined by Taylor in his "Law Glossary" to be "a foothold; a trespasser; what is termed 'a squatter.'" — *Von*

Digitized by Google

Phul v. *Penn*, 31 Mo. 333; *Rutherford* v. *Ullman*, 42 Mo. 216; *Babe* v. *Phelps*, 65 Mo. 27. And the moment respondent allowed his fence to disappear, the possession of these lots invested in appellants. — *May* v. *Luckett*, 48 Mo. 472. And this notwithstanding the tract was divided into blocks and lots. — *Williams* v. *Ballance*, 23 Ill. 193; affirmed in *Hassett* v. *Ridgway*, 49 Ill. 197; *Janes* v. *Patterson*, 62 Ga. 527; *Hubbard* v. *Austin*, 11 Vt. 129. It is immaterial how appellants obtained possession, even if by fraud or actual force. — *Reed* v. *Caldwell*, 32 Cal. 109; *Calderwood* v. *Brooks*, 45 Cal. 519; *Scorpion M. S. Co.* v. *Marsano*, 10 Nev. 378; *Goldberg* v. *Taylor*, 2 Utah, 486 and 492; *Steele* v. *Fish*, 2 Minn. 153; *Murphy* v. *Hinds*, 15 Minn. 182. And a fence always constitutes a legal possession. — Rev. Stats., sects. 5651, 5652; *King* v. *St. Louis Gas-Light Co.*, 34 Mo. 34 and 38; *Campbell* v. *Allen*, 61 Mo. 581; *Southmayd* v. *Henly*, 45 Cal. 101; *Gillispie* v. *Jones*, 47 Cal. 259.

CLINE, JAMISON & CLINE, for the respondent: Evidence of title in the plaintiffs was inadmissible. — *Rutherford* v. *Ullman*, 42 Mo. 216. Plaintiff must show a beneficial possession which he can not abandon, and himself bring the action of ejectment without injury to his interest. A nominal possession is insufficient. — *India Wharf* v. *Central Wharf*, 117 Mass. 504; *Brown* v. *Matthews*, 117 Mass. 506; *Tompkins* v. *Wyman*, 116 Mass. 558; *Byrne* v. *Hinds*, 16 Minn. 521; *Comstock* v. *Henneberry*, 66 Ill. 212; Cf. *Jackson* v. *Schoonmaker*, 2 Johns. 234. Possession gained through sharp practices or fraud will be ignored by the court. — *Rutherford* v. *Ullman*, 42 Mo. 216; *Stetson* v. *Cook*, 39 Mich. 750, 755; *Tichenor* v. *Knapp*, 6 Ore. 205. The possession must be *bona fide*. — *Stetson* v. *Cook*, 39 Mich. 750–755; *Hardin* v. *Jones*, 86 Ill. 316; *Comstock* v. *Henneberry*, 66 Ill. 212; 20 Am. L. Reg. 561. 570.

Digitized by Google

LEWIS, P. J., delivered the opinion of the court.

This is a proceeding to quiet title, under section 3562 of the Revised Statutes. The circuit court gave judgment for the defendant.

The two lots in controversy have never been occupied otherwise than by the several acts of fencing hereinafter described. The plaintiffs undertook to show a chain of title to the fee in themselves, of a larger tract, including these lots, and an actual occupancy by their tenants of other lots within the tract, but not in the same block with the lots in controversy. The court properly excluded this testimony. There is no question about title in this proceeding. All such questions are distinctly excluded by the very nature and purposes of the action, which assumes that another suit is necessary to try the title; wherefore the defendant should be directed to begin it. The statute does not require the plaintiff to show that he has any title; but only that he *claims* "an estate of freehold, or an unexpired term of not less than ten years," and has the premises in possession. As to what he claims, an averment in the petition will suffice, and will not be issuable, nor can there be any proof of title for the mere purpose of raising the legal presumption of possession, which follows the fact of title. This presumption originates in the courts for certain purposes looking to the ends of justice. It will not satisfy the statute, which demands, not a judicial presumption, such as may arise in the progress of litigation, but the fact of possession, really existing before the action is begun. A man may have an undisputed title to a tract of land which neither he nor any one claiming under or acting for him has ever occupied, or even seen. The courts, for the purpose of protecting him against injury by trespassers, will recognize a constructive possession in his favor. But there is no real possession in the case; and, therefore, nothing that would satisfy the statute we are considering.

Digitized by Google

It should always be borne in mind that the statutory proceedings to quiet title was never intended as a substitute for the action of ejectment. It assumes that the complainant can not maintain ejectment, because he already enjoys an exclusive and undisturbed possession. If, therefore, so far as the element of possession, or the want of it, is concerned, he might maintain ejectment against an adverse claimant, this statutory proceeding is not for him. No court can properly permit him, in such case, to change, by ruse or contrivance, the relations between contending claimants, so that the right or duty to sue in ejectment shall be shifted from him to the other party. On the other hand, it is the settled construction of this statutory proceeding, that it will not be denied to a party who, in order to bring ejectment, would be compelled to abandon an actual, accustomed, and beneficial use and possession. *Munroe* v. *Ward*, 4 Allen, 150.

Counsel for the plaintiffs argue that they could not sue in ejectment, because the lots were unoccupied, and it was impossible to show a hostile possession in the defendant. They refer to a number of cases in which possession is defined with reference to the statute of limitations, or the action of forcibly entry and detainer. But we know of no case in which it is held that the same open, notorious, actual, exclusive, adverse and continuous possession so defined, must be fixed upon the defendant in an action of ejectment. On the contrary, it is held that one whose enjoyment of his real estate is wrongfully interfered with, may, at his election, often treat the wrong-doer as a disseisor, although not himself actually ousted or dispossessed. *Smith* v. *Burtis*, 6 Johns. 215; *Prescott* v. *Nevers*, 4 Mason, 329. In such a case of election, however, the party suing in ejectment must abandon his possession while the action is pending. *Munroe* v. *Ward*, *supra*; *Burns* v. *Lynde*, 6 Allen, 312. In the ancient action of ejectment, it was sufficient to allege in the declaration a mere entry by the casual

Digitized by Google

ejector, and ouster of the fictitious plaintiff lessee. Our statute, which abolished the fictions of that proceeding, and was intended to simplify the action, has not heretofore been construed so as to increase the burden on the plaintiff. It seems to be sufficient generally to show that the defendant has done acts which, as against the plaintiff, would amount to a disseisin. The vital fact is, an entry by the defendant as owner, intending to hold the premises in that capacity. Surveying and dividing into lots and blocks may constitute such an entry. Payment of taxes, though not an act of possession, may be competent in evidence to show the intent. *Webb* v. *Richardson*, 42 Va. 465. It is apparent from the undisputed facts in this case, that the plaintiffs, if they had a better title than the defendant, could, at any time within many years past, have maintained ejectment, without any sort of hindrance on the ground that the defendant and his predecessors were not adverse holders. The testimony tended to show that the whole of the larger tract which included the lots in controversy was originally laid off into blocks and lots, with streets and alleys, as they now remain, by those under whom the defendant claims; that the defendant had been paying taxes, general and special, on these lots for thirteen years before the commencement of this suit; that, in April, 1878, the defendant built a post and board fence around the lots, and employed a man to keep the same in repair; that this fence stood for about four months, after which the defendant, though he did not rebuild, "went by and over said premises occasionally, looking at and after them, and claiming to own them." The plaintiffs never paid any taxes on the lots. The testimony tended to show, on behalf of the plaintiffs, that in April or May, 1878, one of them, acting for himself and the others, enclosed the lots with a post and a board fence, which he repaired from time to time, until the ensuing August, when he removed to Springfield, Missouri. On

Digitized by Google

the morning of October 13, 1881, the same plaintiff caused the lots to be enclosed by posts connected with barbed wire in three strands. The work was finished at half-past eight o'clock, A. M., and the petition in the cause was filed at half-past ten on the same day. The defendant destroyed and removed the structure before the next morning. It was shown that this last work of the plaintiffs was done by advice of their counsel, and with a view to the institution of the present suit.

The court, upon the plaintiffs' application, gave three instructions in general terms, and refused one to the effect that if, at the time of filing the petition herein, the plaintiffs had the premises described therein enclosed or fenced, then they were in the actual possession of said premises. That this refusal was proper must be apparent from what we have already said.

The instruction, if given, would have precluded any finding upon the material issue, whether the hurried fencing done by the plaintiffs was indicative, not of an actual and peaceable occupancy, but of a mere interference with the ancient prior possession of the defendants, designed only to make an illusive show for the purpose of this suit. The instruction seems to assume that the making of a fence is conclusive evidence of possession. On the contrary, it may, according to circumstances, be as clearly a trespass, as the unauthorized felling of trees or removal of buildings. Whether it was so or not, in the present case, was a question of fact for the court, sitting as a jury, to determine from the evidence. Upon the court's refusal of the last-mentioned instruction, the plaintiffs took a non-suit, which the court afterwards declined to set aside. Some exceptions were saved by the plaintiffs to admissions and exclusions of testimony. The rulings of the court on these points were in entire harmony with the views herein set forth.

The judgment is affirmed. All the judges concur.

Digitized by Google

THOMAS W. DYER ET AL., Appellants, v. A. REITZ ET AL., Respondents. 14 45 34 417 14 45 42 541

May 15, 1884.

FORCIBLE ENTRY AND DETAINER — POSSESSION. — A possession obtained by an act of trespass in building a fence is not such a possession as will support an action of forcible entry and detainer against a claimant who destroys the fence.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

T. A. RUSSELL and E. P. JOHNSON, for the appellants.

FRANK K. RYAN, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

This is an action of forcible entry and detainer. At the close of the testimony, upon the giving and refusing of instructions by the court, sitting as a jury, the plaintiffs took a non-suit, which the court afterwards refused to set aside.

The whole controversy turns upon the question whether the plaintiffs were in peaceable possession of the premises, at the time of the alleged forcible entry by the defendants. The testimony tended generally to show that, until on or about October 13, 1881, when one or more of the defendants began to use the lots as a stoneyard, they had lain vacant, and had never been occupied for any useful purpose. The plaintiffs' testimony tended to prove that in April or May, 1878, they enclosed the lots with a board fence, which remained standing until August of the same year; and that, on the morning of October 13, 1881, they closed the lots in with posts about twelve feet apart, connected by barbed wire in three strands. These posts and wires were removed by other persons, possibly the defendants. Within forty-eight hours the defendants erected a more substantial fence, and continued to occupy the prem-

Digitized by Google

ises until the institution of this proceeding, on November 8, 1881. One of the plaintiffs, who acted for all in causing the fences to be built, as stated, testified that the special object of that work in each instance was to aid in a contemplated litigation about the title. Several witnesses for the defendants testified that they had lived near the lots and seen them daily for many years, beginning long before 1878, but they had never seen any enclosure around the lots prior to that built by defendants.

Every legal procedure is intended for the redress or prevention of some wrong or grievance; or, in another form of expression, for the enforcement of some right. Procedures are divided into classes, each being adapted to a particular method of protecting a specific class of rights. Thus, ejectment is designed to protect and enforce the right of possession derived from ownership or title; while the action of forcible entry and detainer sustains only the right to remain in a possession peaceably acquired and held, until this shall be determined by due course of law. Possession, in either case, means a real dominion, capable of devoting the property to some beneficial use, however small, by him who enjoys it. Procedure must be invoked in behalf of such dominion, as a substantial right, whose enjoyment is invaded, or withheld; and not for the mere purpose of securing a vantage ground for other litigation. The suitor who employs it for the latter purpose, attempts a fraud upon the law. He would have the courts employed, not in administering justice between litigants, but in rewarding only the most skillful strategist. Such a case is exactly presented by the party who relies on what has been aptly called a "scrambling possession." It is a possession without anys avor of the legitimate enjoyment of property rights, and neither sought nor secured on any such account; but which is only scrambled for, by one party or by both, because of some supposed advantage it may command in a pending struggle. The uniform course of

Digitized by Google

adjudication, here and elsewhere, has always been to refuse recognition of such a miscalled possession as investing its claimant with any title to the protection offered in behalf of a peaceable occupancy, however acquired, which the holder intends and uses simply as an exercise of that dominion which insures an enjoyment of the ordinary and accustomed rights of property. *Keene* v. *Schnedler*, 9 Mo. App. 597. The argument here made for the plaintiffs seems to assume that the act of building a fence or enclosure creates *ipso facto* a peaceable possession in the builder, which he may ever thereafter maintain by the action of forcible entry and detainer. We know of no law to that effect. If the party commit a trespass, in order to build the fence, he will still be a trespasser, notwithstanding the fence. If the fence be only a feature of his strategy to gain advantages in litigation, it will not better his position. It sufficiently appears from the action of the circuit court, in giving and refusing instructions, that the learned judge, sitting as a jury, did not find from the evidence any disturbance by the defendants of an actual and peaceable possession held by the plaintiffs and entitled to legal protection. In our view of the testimony, he could not well have erred in finding that the hasty erection on the morning of October 13, 1881, was a mere scrambling effort by the plaintiff to gain a certain *status* in prospective litigation, and was not in any sense a peaceable or *bona fide* acquisition or assertion of actual possession, sufficient to furnish a foundation for the present proceeding. The fencing done in 1878 made no better showing. For whatever it was worth, it had been abandoned by the plaintiffs for more than three years, at the time of the forcible entry herein complained of. The bill of exceptions is imperfect in not setting out the record of a suit, which was offered in evidence, and for which a proper call is made, but enough appears from other testimony given with reference thereto, to show that, in the fall of 1878, these plaintiffs sued in ejectment, for a large tract

Digitized by Google

and for several parcels of land, in different suits, and that, in one or more of those suits, the lots here in controversy were included. A suit in ejectment necessarily admits that the complaining party is not in possession of the land sued for.

The plaintiffs complain, on authority of *DeGraw* v. *Prior*, (53 Mo. 313), that the court erred in giving an instruction that, upon the evidence, the plaintiffs were not entitled to recover. The authority does not apply. The court in that case gave no other instruction, and undertook to dispose of all controverted questions of fact, about which there was substantial testimony on both sides, by a general declaration of the result. The supreme court said that this was equivalent to taking issues away from a jury, upon which there was evidence proper to be left with them for their finding. The objection does not exist in the present case. The court here gave full instructions, or declarations of law, covering every point upon which an instruction could properly be given. Thus no issue was taken away from the trier of fact, but every one was submitted upon a hypothetical statement, with its appropriate conclusion of law. The general finding was thus fully elucidated, and was free from the objections made by the supreme court in the case of *DeGraw* v. *Prior*.

The judgment is affirmed. All the judges concur.

BURCHARD VOIGT, Respondent, *v.* OLIVER AVERY, Appellant.

May 15, 1883.

1. FORCIBLE ENTRY AND DETAINER.—Forcible entry and detainer will lie where the plaintiff has been dispossessed by force.
2. —— DEMAND.—No written demand for possession is necessary where the original entry by the defendant was unlawful.

Digitized by Google

3. —— CHANGE OF VENUE—JUSTICES—WAIVER.—The requirement that, on change of venue, the papers must be sent to the nearest justice is not jurisdictional, and is waived by an appeal.

4. —— Such an irregularity is waived by an appearance to the merits before the justice to whom the papers are sent.

APPEAL from the St. Louis Circuit Court, BOYLE, J. *Affirmed.*

L. J. SMITH, for the appellant.

M. W. WATSON and LUCIEN EATON, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action of forcible entry and detainer. The plaintiff had a verdict and judgment in the circuit court. The points upon which the appellant relies are:—

1. That the complaint does not state a good cause of action. The complaint is well drawn.

2. That the evidence offered by the plaintiff tended to prove an unlawful detainer, but not a forcible detainer. This is not so. The evidence is, that the plaintiff recovered the premises in an action of ejectment, and was put in possession, through his agent, by the sheriff, under a writ of restitution. A few days afterwards the defendant succeeded in effecting an entry into the house, and in resuming possession by force and without the consent of the plaintiff. The defendant's counsel says he was in "by disseisin." That is true; and therefore the plaintiff had a right to resort to this remedy in order to get him out. *Krank* v. *Nichols*, 6 Mo. App. 72.

3. That no demand in writing was made upon the bringing of the suit. No demand is necessary where the original entry is unlawful. *Silvey* v. *Summer*, 61 Mo. 253; *DeGraw* v. *Prior*, 53 Mo. 313.

4. That the justice to whom the case was sent by change of venue had no jurisdiction, because he was not "the next nearest justice." The general statute defining the jurisdiction of justices of the peace provides that "every

Digitized by Google

justice of the peace shall have jurisdiction co-extensive with the county for which he shall be elected or appointed." Rev. Stats., sect. 2838. The statute relating to forcible entry and detainer, under which this action was brought, likewise provides that "forcible entries and detainers and unlawful detainers shall be cognizable before any justice of the peace of the county in which they are committed." Rev. Stats., sect. 2422. By section 3126 of the Revised Statutes it is provided that "whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city." The statute relating to changes of venue in actions before justices of the peace is as follows: "Upon the filing of the affidavit in due time, the justice must allow the change of venue and note the fact in his docket, and immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, or if the change be allowed, on account of the bias or prejudice of the inhanitants of the township, then to a justice in some other township in the county." Rev. Stats., sect. 2953. In the light of these statutes, how can it be said that the justice to whom the cause was sent had no jurisdiction? The suit was commenced in the city of St. Louis, within and for which he was a justice, and his general statutory jurisdiction, and his special jurisdiction in actions of forcible entry and detainer, were, by the express terms of the statutes, co-extensive with the city. If he was not the "next nearest justice" to the one from whom the change of venue was taken, it was at most an irregularity which did not go to his jurisdiction. Such an irregularity is waived by taking an appeal to the circuit court. *Berkley* v. *Kobes*, 13 Mo. App. 502, and cases there cited.

These decisions show that there is no such jurisdictional

Digitized by Google

defect in the sending of the papers to a justice, other than the next nearest justice, as may not be waived by the parties. In this case the change of venue was taken by the defendant, who now complains of the jurisdiction of the justice to whom it was taken. He appeared twice before this justice and submitted to the jurisdiction without any objection, so far as the justice's transcript shows, and two trials were there had; and, so far as appears, he made the objection to the jurisdiction in the circuit court for the first time.

The justice's transcript does not show the grounds on which the change of venue was taken, and the affidavit on which it was granted does not appear in the record. For aught that appears, it may have been on the ground of the bias or of the prejudice of the inhabitants of the ward in which the suit was brought. If this was the ground, then the justice was not obliged, by the terms of the statute, to transmit the papers to the next nearest justice. Rev. Stats., sect. 2953. Even if the question of jurisdiction were at all involved, we should not presume, for the purpose of ousting the jurisdiction that grounds were not laid in the affidavit for the change of venue which warranted the justice, in compliance with the statute, in transmitting the papers to the justice to whom he did transmit them. Under our statutes the jurisdiction of justices of the peace has become so extensive and important that it may be doubted whether the rule that these courts are bound to certify everything precisely which relates to their jurisdiction applies in its ancient strictness. *Wright* v. *Hazen*, 24 Vt. 143; *Ex parte Boland*, 11 Texas App. 159, 169. But however this may be, it is clear of doubt that the requirement that, on a change of venue from one justice to another, the papers are to be sent to the next nearest justice, except where the change is granted on the ground of the bias or prejudice of the inhabitants of the township in which the suit is commenced, does not relate to a matter which is jurisdictional.

Digitized by Google

It is an irregularity which may be waived. It is "an error, defect, or imperfection" in the "proceedings of the justice," such as, on an appeal, the circuit court is expressly commanded by the statute to disregard. Rev. Stats., sect. 3062. We should not have said this much upon this point but for the fact that here the appeal to the circuit court was taken by the plaintiff, and therefore the case is distinguishable from that of *Berkley* v. *Kobes*, 13 Mo. App. 502, and other cases there referred to, where the defendant, by appealing to the circuit court, was held to have waived this objection.

It thus appears that none of the grounds upon which we are asked to reverse the judgment is well taken. The judgment is accordingly affirmed. All the judges concur.

14 52
38 607

John B. Dyer et al., Plaintiffs in Error, *v.* Henry Wittler et al., Defendants in Error.

May 15, 1883.

1. Husband and Wife — Tenant by Curtesy. — During coverture, where issue is born alive of the marriage, the husband is not a tenant by the curtesy of his wife's lands, but is seised only by right of his wife.
2. —— Seisin — Actions. — Their seisin is joint, and if they are disseised they must jointly sue to recover possession.
3. —— The children in such a case, have no right of entry or of action upon the death of the wife, the husband surviving.
4. —— Limitations. — Upon the death of the husband after the wife in such case, the children, though infants, must sue within such time as, rejecting the period during which the life estate of the father barred their right of entry, would be within twenty-four years from the beginning of the adverse possession of the defendant.

Error to the St. Louis Circuit Court, Thayer, J.

Affirmed.

Digitized by Google

THOMAS A. RUSSELL and E. P. JOHNSON, for the plaintiffs in error.

THOMPSON, J., delivered the opinion of the court.

This is an action of ejectment. The defence is the statute of limitations of twenty-four years. Rev. Stats., sect. 3222. The reply is, that in the year 1838, the mother of the plaintiffs was the owner of the land in fee simple, having inherited it from her father; that she was, at the time, the wife of Abner W. Dyer, their father; that there was issue born alive of the marriage in 1837; that their marital relation continued until 1869, when it was dissolved by the death of the mother; that the father died a year later; that the plaintiffs are the only surviving issue of the marriage, and claim the premises as heirs of their said mother.

At the trial, evidence was given tending to support this reply.

The court, under appropriate evidence, offered by the defendants, gave the following declaration of law, which drove the plaintiffs to a non-suit: —

"The court, of its own motion, declares the law to be, that if defendants, or those under whom they claim, entered upon a tract of land, embracing the premises described in the petition herein, in the year 1846, claiming to own said tract under and by virtue of a deed purporting to convey the same to them in fee, and in that year enclosed said tract with a fence, and improved, occupied and cultivated said tract (or the portion thereof described in the petition), so enclosed and improved, continuously from that time, under such claim of title, up to the time of the death of Abner W. Dyer, on or about the 25th of June, 1870, and for three years next after his death, and before the original petition in this case was filed, the plaintiffs are not entitled to recover."

Digitized by Google

We see no error in this ruling. In our opinion, the case is governed by *Valle* v. *Obenhouse* (62 Mo. 81). It is there said by the court, speaking through Napton, J.: * * * "All of our statutes, from 1825 down to the present time, clearly imply that a right of action may exist in a married woman. The husband is understood to be jointly seised of his wife's estate; and during the existence of the coverture he is not tenant by the curtesy, but only seised by right of his wife; and if there be a disseisin, it is of the joint estate, and they must jointly bring an action to recover the possession. Under this view of the title of husband and wife in lands of the wife, the statute of limitations will begin to run from the date of the disseisin against both." The statute of twenty-four years, then began to run with the commencement of the defendant's adverse possession under color of title in 1846. Before the bar had attached, namely, in 1869, the wife of Abner W. Dyer and the mother of these plaintiffs, died. During the year which followed, until the death of Abner W. Dyer, in 1870, he was tenant by curtesy consummate of the lands; his intervening life estate prevented these plaintiffs from having a right of entry, and consequently a right of action. When he died, in 1870, their right of action accrued; and, although they were then under the disability of infancy, they were bound to bring their action within such time as, rejecting the time during which their father's life estate had barred their right of entry, would have been less than twenty-four years from the commencement of the adverse possession of the defendants. At least, having reference to the provisions of section 3224, of the Revised Statutes, they were bound to commence their action within three years after the death of their father, as we understand the Supreme Court to hold in *Dyer* v. *Brannock* (66 Mo. 391, 422), adjudicating upon this very title.

This they did not do. They did not commence this action until 1878. At this time, excluding the year in

Digitized by Google

which their father held the life estate, thirty-one years had run, during which the defendants had had continuous adverse possession under color of title. If this did not perfect their title, the statute, instead of being "a statute of absolute repose," as it was called by this court in *Barrett* v. *Alleghany Nat. Bank* (6 Mo. App. 319), would be, according to the expressive suggestion of Napton, J., in *Valle* v. *Obenhouse* (62 Mo. 85), "a mere *brutum fulmen.*"

The judgment of the circuit court is affirmed. All the judges concur.

STATE OF MISSOURI, TO THE USE OF TABITHA GARNER, Respondent, *v.* HENRY W. MERTZ, ADMINISTRATOR, ET AL., Appellants.

May 29, 1883.

1. HUSBAND AND WIFE — ACTIONS — PARTIES. — In an action, on a constable's bond, for an illegal levy upon the earnings of a wife and minor children whose husband and father had abandoned them, the husband is not a necessary party as a relator of the plaintiff.
2. —— ABANDONMENT. — In such a proceeding it is immaterial that a judicial finding of abandonment and a decree for maintenance, under the statute, has not been had.
3. —— EVIDENCE. — Evidence of what the husband said at the time of leaving, as to his reason for leaving his family, is competent to show abandonment.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Affirmed.

ZACH J. MITCHELL, for the appellants.

G. PITMAN SMITH and JOHN W. MCELHINNEY, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action upon the official bond of Henry W. Mertz, since deceased, as constable. The breach of the

Digitized by Google

condition of the bond, which the petition alleges, is that the constable, having an execution in favor of one Wilson against E. N. Garner and James T. Garner, but not against the relator, levied the same upon certain corn in the field, partly harvested, belonging to the relator, and sold the same thereunder. The plaintiff is the wife of the said E. N. Garner, and the mother of James T. Garner, the latter being of age. She brings this action in her sole name, without the joinder of her husband. The grounds on which she claims the right to sue in her own name are, that her husband, long prior to the levying of the execution upon the corn, had abandoned her without good cause, and wholly neglected and refused to provide for her; that the crop was the proceeds of her own earnings, and of the earnings of her minor children; and that, under section 3286 of the Revised Statutes, it was consequently under her sole control, and not liable in any manner for his debts.

There was a demurrer to the petition for want of proper parties plaintiff, setting up that Mrs. Garner could not maintain the suit without the joinder of her husband. The record does not show the disposition of the demurrer, but it does show that leave was given the plaintiff to file an amended petition, making E. N. Garner, her husband, a party defendant. It does not show, however, that any amended petition was filed; and, as the action is an action at law upon a constable's bond, it is not perceived how E. N. Garner could properly have been made a defendant, since no judgment could have been rendered against him, and no relief had against him. For this reason we infer that the learned counsel for the relator declined to avail themselves of the order of the court making him a defendant. No objections were made or exceptions saved to any action of the court, or want of action, touching the matter of parties. The grounds on which a new trial was asked do not touch this question, nor do the grounds on which the defendants moved in arrest of judgment; though one of

Digitized by Google

the grounds is, that the petition does not state facts sufficient to constitute a cause of action against the defendants.

In this state of the record we apprehend that no question arises touching the capacity of the wife to sue without the joinder of her husband, unless the matter be one which could be reached by writ of error. The general rule is that the failure to make proper parties is an irregularity which must be taken advantage of before the issues are made up and before the case goes to trial, and that if this is not done, the irregularity is waived. Our practice act provides that, "when a married woman is a party, her husband must be joined with her in all actions, except those in which the husband is the sole plaintiff and the wife the sole defendant, or the wife a plaintiff and the husband a defendant." Rev. Stats., sect. 3468. The statute under which the relator claims the right to maintain this suit in her own name reads as follows: "Such married women [that is a married woman who has been abandoned by her husband without good cause] during the period her husband shall fail to provide for her support, as stated in section 3283, shall be entitled to the proceeds of her own earnings, and also to the proceeds of the earnings of her minor children; and the same shall be under her sole control, and shall not be liable in any manner for his debts." Rev. Stats., sect. 3286. We are of opinion that, where two statutes in the same body of laws conflict with each other, and one of them is a statute creating a right, and the other a statute which merely regulates a remedy, the statute regulating the remedy must give way to the statute creating the right. Rights must not yield to mere rules of procedure, but rules of procedure must, when necessary, be altered so as to afford the means of vindicating rights. If we were to require the husband to be joined with the wife in this case, not only the purpose of section 3286 would be subverted, but its express terms would be disregarded. For how can pro-

Digitized by Google

perty be said to be under the *sole* control of a married woman, if, suing in respect of it, she is obliged to join her husband as plaintiff, and thus give him control of the action? The provisions embodied in section 3468 proceed upon the idea the of unity of husband and wife. That is the reason of the rule. But where that unity has been destroyed by the wrongful act of the husband, the reason of the rule ceases; and, in order to give effect to the rights which the legislature has accorded to the wife in such an unhappy situation by the provision of section 3286, the rule itself must cease. Without reference to the question whether the case is properly presented by the record, we, therefore, hold that the action in the present case was well brought by Mrs. Garner without the joinder of her husband.

It is urged, however, that section 3286 of the Revised Statutes is so far controlled by the provisions of section 3283 as to mean, that before a married woman shall be entitled to the proceeds of her earnings and the earnings of her minor children, it must be adjudged, on her petition to the circuit court, as provided in section 3283, that her husband has abandoned her without good cause, etc. We do not think so. Such a construction would go very far to defeat the beneficial provision of section 3286; and, besides, the statute does not say so, and the language used does not fairly conduct the mind to such an inference. Section 3286 merely refers back to section 3283 for a description of the circumstances of abandonment and neglect which will entitle a married woman to the proceeds of her own earnings and those of her minor children. It does not say that, in order to be entitled to such proceeds, she must first have procured an order for support and maintenance against her husband under the provisions of section 3283.

The court, against the objection of the appellant, admitted evidence of what E. N. Garner said at the time when he left his wife touching his reasons for his leaving and his intentions in the premises. Counsel for the appellant is entirely mis-

Digitized by Google

taken in supposing that this was hearsay evidence. It was material to prove that he had left the relator without good cause, as stated in the petition and as recited in the statute under which the action was brought. Rev. Stats., sects. 3283, 3286. His declarations made at the time when he abandoned her, were just as competent upon this point as was the fact that he abandoned her at the date named. Expressions and declarations *dum fervet opus* are not hearsay, but are regarded in law as verbal acts, part of the *res gestæ*, and competent evidence.

Finally, it is urged that, upon the evidence the property levied upon was not the property of the relator; that the lease of the ground on which the corn had been raised was a sham and a fraud, instigated by her son, James T. Garner, codefendant with her husband, in the judgment under which it was levied on by the constable, for the purpose of defeating this very judgment which was about to be recovered. A good answer to this is, that no such question was made by the defendant's answer nor by any testimony in the case, nor was such a question submitted to the jury, nor did the defendants ask to have such a question submitted to them. If such a question had been submitted to the jury upon the evidence in the record, their verdict would have been conclusive upon it. We have looked over the record carefully, and are of opinion that the verdict is supported by the evidence, and that it has reached the justice of the case. It would be a reproach to the law if this poor old woman, having been abandoned by a drunken husband, and having thereafter made a crop upon rented land, chiefly through the aid of her minor children, could have it wholly swept away from her under an execution against her husband and her adult son.

The judgment is affirmed. All the judges concur.

Digitized by Google

JOHN FENDLER ET AL., Respondents, *v.* OLIVER DEWALD, Appellant.

May 29, 1883.

1. NEW TRIAL — PRACTICE. — Appellate courts will not reverse a judgment for a refusal to grant a new trial, unless the trial court has abused its discretion.
2. —— A new trial will not be granted because of remarks made by witnesses, out of court, in the hearing of the jurors, unless such remarks have an apparent tendency to prejudice the losing party.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Affirmed.

P. LEAHY, for the appellant.

O. G. HESS, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This was an action on an account, commenced before a justice of the peace and tried anew in the Circuit Court. The evidence was quite conflicting, so much so as to lead to an unavoidable inference that some of the witnesses were guilty of perjury. The testimony of the plaintiff, Mrs. Fendler, and her witnesses, was sufficient to support the verdict which the jury rendered in her favor. The testimony of the defendant and his witnesses went equally to show that he owed her nothing. The court gave all the instructions which were asked by either party, and these instructions appear to have put the case to the jury in a manner free from objection.

The substantial ground on which a new trial is sought is, that during a recess of the court, while the cause was on trial, some of the jurors, who had remained in the court-room, "did converse with and listen to the statements of the witnesses for the plaintiff; * * * which said witnesses were not then on oath; * * * that the statements

Digitized by Google

and conversations of said witnesses, so made and carried on in the presence and hearing of said jurors, were calculated to prejudice the rights of this defendant." The affidavits, in support of this charge, are, all of them except one, the affidavits of the defendants and his witnesses, and there are counter-affidavits filed by the plaintiff and her witnesses. The single affidavit made by a person not a witness was that of the deputy sheriff, who had charge of the court-room at the time. He deposed that "three or four of the jurors; * * * during the recess of the court, and before the trial of the said cause was fully terminated, remained and listened to statements, discussions, and accusations of the plaintiff, Mary Fendler, and her sisters and witnesses, against defendant's witnesses in relation to the case on trial, * * * and so remained until separated by this affiant."

The affidavits of the defendant's witnesses are to the effect that the plaintiff and her sisters, who were witnesses in her behalf, at the time in question, used loud, boisterous and insolent language towards the defendant and his witnesses, who had remained in the court-room, accusing them of having sworn falsely. The counter-affidavits of the plaintiff and her witnesses tend to show that some warm words passed between the respective parties and witnesses, or some of them, as to why they had appeared and testified against each other, as they had done. None of these affidavits show that any statements, in the nature of evidence, were made in the hearing of the jurors, which would have had a tendency to influence them one way or the other.

The learned judge who had heard these witnesses at the trial, who knew the bailiff who had charge of the court-room, and who had better opportunities than we have of coming to a sound conclusion as to the value of their statements, did not deem the affidavits a sufficient ground for a new trial. The rule of the law is, that the granting of new

Digitized by Google

trials on such grounds as this, is a matter which addresses itself to the sound discretion of the judge who presided at the trial, and that his ruling will not be reversed on appeal unless it appears that his discretion was abused. The rule which is generally laid down for the exercise of this discretion in civil cases is, that a new trial will not be granted because of communications out of court between jurors and witnesses, or remarks made by witnesses in the hearing of jurors, unless such communications or remarks have an apparent tendency prejudicial to the unsuccessful party. *Thrift* v. *Redman*, 13 Iowa, 25; *Jones* v. *Vail*, 30 N. J. L. 135; *McIlvaine* v. *Wilkins*, 12 N. H. 474; *Jackson* v. *Jackson*, 32 Ga. 325, 335; *Tiernan* v. *Trewick*, 2 Utah, 393. Proceeding in conformity with this rule, we can not say, in the face of the opinion of the judge who presided at the trial, that the facts disclosed by these affidavits prejudiced the case of the defendant in the minds of the jury.

The judgment is accordingly affirmed. All the judges concur.

B. D. REILLY, Respondent, *v.* WILLIAM REILLY, Appellant.

May 29, 1883.

CONTRACT — PARTNERSHIP — EVIDENCE — PRACTICE. — In an action on a contract by which the defendant agreed to pay the plaintiff one-half of his interest in the net profits realized by the firm of which he was a member, on a certain contract, the plaintiff need not allege or prove a settlement between the defendant and his copartner; it is sufficient to show the net profits on the transaction and the defendant's interest therein.

APPEAL from the St. Louis Circuit Court, BOYLE, J.

Affirmed.

G. M. STEWART, for the appellant.

E. F. FARISH, for the respondent.

Digitized by Google

LEWIS, P. J., delivered the opinion of the court.

The petition sets forth, in effect, that the defendant and James Reilly were partners composing the firm of James Reilly & Co., engaged in the performance of certain railroad contracts. That, by request of the defendant, the plaintiff performed services, as his agent, manager, and employe, in and about the work and business done under said contracts for which the defendant promised and agreed to pay the plaintiff as follows: —

For services rendered on account of the contract first described in the petition, $500; for services on account of the contract secondly described, one-fourth part of the net profits realized by James Reilly & Co., being one-half of defendant's share thereof, upon the work done under said contract, which said one-fourth part, the petition avers, was the sum of $1,185.88; for services rendered on account of the contract thirdly described, a like one-fourth part of the net profits, which fourth part, the petition avers, was the sum of $1,080.56; for services rendered on account of the contract fourthly described, the sum of $900. Credits are allowed to the defendant, amounting to $537.50. The court, sitting as a jury, found for the defendant, on the first charge in the petition and for the plaintiff on the others, and gave judgment accordingly.

The findings of fact are substantially sustained by the evidence set out in the record. The defendant demands a reversal of the judgment, on the ground that no cause of action is stated in the petition, and also on the ground that the evidence does not warrant any judgment based on the pleadings. Both these grounds depend upon the defendant's underlying proposition that there could be no recovery by the plaintiff of any amount as a fractional part of the profits made by the firm of James Reilly & Co., without averment and proof of a settlement between the partners, and of the

amount of profits, and the fractional interests therein, as ascertained by such settlement.

We are not shown any authority for this method of applying a well known rule relating to the claims of partners against each other, nor do we think that there is one. Each of two partners has an equal ownership in the common fund; so that it can not be said how much belongs exclusively to either one without an accounting and settlement, to show how much each has already received, and how much remains for distribution. As their interests are equal and mutual, so each must have an equal voice in this accounting and settlement, and one can be charged with nothing upon the mere motion of his copartner. So also each is entitled, within the terms of their agreement, to demand of the other a joint accounting and settlement, for the better defining of his rights, liabilities, and interests. If partner A refuse to account, upon the proper demand of partner B, B may compel him to do so, through the aid of a court of chancery. All of these features are foreign to the relation existing between a third party, as a personal creditor, and one of the partners. Perhaps the most striking distinction, which is clearly fatal to the defendant's position, lies in the fact that a creditor of the partner — as the plaintiff in the present case — has no possible means of compelling a settlement between the partners. His demand being against partner A only, he has no claim upon partner B, is in no sort of privity with him, and has no right to bring him into court. Neither partner may desire a settlement, and both may lawfully refuse to make one. Was it ever heard that, in such a case, upon the application of a stranger to the firm, — who has no claim against the firm, and no judgment, lien, or transfer affecting any interest in the firm concerns, — a court of equity could step in between the partners and force them to make a settlement of their private affairs, whether they will or not? Surely not. Yet if the present plaintiff, having a

Digitized by Google

just demand against the defendant, may not sue upon it, until such time as it may please the defendant and his partner to come to a settlement, or until one partner shall have elected to compel the other in equity, then, since it may be that neither contingency will ever arise, the plaintiff has a right, but is absolutely without a remedy — a condition which the law abhors, as nature does a vacuum.

There is nothing in common between the relations of a creditor to the debtor partner, as an individual who may be sued, and the relations between the partners themselves. The amount of the defendant's share in the profits of his firm is, in the present case, simply a fact, to be proved like any other fact, for the purpose of showing how much, if anything, the plaintiff ought to recover. It differs in nothing as between these parties, from any material fact which may be established by the admissions of a party against his interest. The plaintiff as a witness, testified that the defendant distinctly admitted, in conversations, the amounts of his net profits on the several contracts, as they are respectively stated in the petition. Other facts were also put in evidence, which tended, substantially, to the same result.

We find no error in the record, and must affirm the judgment. All the judges concur.

CHARLES F. LIEBKE ET AL., Plaintiffs in Error *v.* L. METHUDY ET AL., Defendants in Error.

14a	65
31a	156
14	65
42	305

May 29, 1883.

1. EVIDENCE — ORAL TESTIMONY TO VARY WRITING. — The rule that oral testimony is inadmissible to vary a writing has no application to a collateral obligation which involves no departure from, but which sup-

plements, a writing which manifestly does not contain the entire contract.

2. —— FRAUDULENT REPRESENTATIONS. — Fraudulent representations going to the essence of a contract, and on the faith of which the contract is made, furnish a cause of action, though not embodied in the written contract, and may be proved by oral testimony.

ERROR to the St. Louis Circuit Court, THAYER, J.

Reversed and remanded.

G. M. STEWART, for the plaintiffs in error: The scale bill by which the plaintiffs bought the logs in question became a part of the contract of sale, so that defendants are bound by it, although not referred to in the memorandum or bill of sale. — *Chapin* v. *Dobson*, 78 N. Y. 74; *Phelps* v. *Whitaker*, 37 Mich. 72; *Richards* v. *Fuller*, 37 Mich. 161; *Railroad Co.* v. *Walsh*, 85 Ill. 58; *Doulin* v. *Daegling*, 80 Ill. 608; Greenleaf Ev. (9th ed.), sect. 283; Greenleaf (Redf. ed.), sect. 284 *a*; *Wallis* v. *Little*, C. B. (N. S.) 368; *Wake* v. *Harop*, 1 Hurl. & Colt. 200; *Life Assn.* v. *Draven*, 60 Mo. 388; *Moss* v. *Green*, 41 Mo. 389; Benj. on Sales (1st Am. ed.), sect. 203.

KEHR & TITTMANN, for the defendants in error: Oral testimony to vary the terms of a written contract is inadmissible. — *Lazear* v. *National Union Bank*, 52 Md. 79; Story on Sales (4th ed.), p. 426, sect. 360; *New Lindell Hotel Co.* v. *Bailey*, 3 Mo. App. 598. And if a written warranty is given by vendor to vendee, the latter can not recover for the breach of an additional warranty. The written warranty is conclusively presumed to embrace all the warranty that was made. — *Shepherd* v. *Gilfroy*, 46 Iowa, 193; *Mullain* v. *Thomas*, 43 Conn. 252; *Buechtel* v. *Mason Lumber Co.*, 1 Flip. 640. Thus "the warranty of title expressed, is an exclusion of all other warranties not expressed and conclusive, that the defendant will not warrant the quality or soundness." — *Wren* v. *Wardlaw*, Minor, 363; *Pender* v. *Fobes*, 1 Dev. & B. 250; *Smith* v. *Williams*, 1

Digitized by Google

Murph. 426; cited and approved in *Pearson* v. *Carson*, 69 Mo. 550. In the sale of these logs, the rule *caveat emptor* applies. There was no implied warranty of quality or of value. — *Lindsay* v. *Davis*, 30 Mo. 450; Add. on Con., sect. 616, p. 211. Where there is an express written warranty, there can be no recovery on an implied warranty. The law will not imply what is not expressed in a written instrument. There is no room for an implied warranty in such a case. — *Lanier* v. *Auld*, 1 Murph. 138; *Dunning* v. *Foster*, 42 N. H. 165; *McGraw* v. *Fletcher*, 35 Mich. 104; *Sparks* v. *Messick*, 65 N. C. See, also, *Salem Rubber Co.* v. *Adams*, 23 Pick. 256; *Rose* v. *Hurley*, 39 Ind. 81; *McCure* v. *Jeffries*, 8 Ind. 83.

LEWIS, P. J., delivered the opinion of the court.

The plaintiffs, as purchasers from the defendants of a lot of walnut logs which were lying in Reelfoot Creek, in the State of Tennessee, sue for breaches of the contract and guaranty embodied in the sale. The court sustained a demurrer to the plaintiffs' evidence.

The testimony tended to show that Meyer, a member of the defendant firm, proposed to Liebke, one of the plaintiff partners, in the city of St. Louis, to sell to the plaintiffs a lot of five hundred and twenty walnut logs, then lying in Reelfoot Creek and its tributaries, and at the same time handed to Liebke a scale bill, showing separately the length and diameter, in feet and inches, of every log. Liebke and Meyer went over the list together and calculated, by rules familiar to lumber dealers, the quantity of lumber that could be sawed out from each log, and the average number of feet per log that the whole lot of five hundred and twenty would yield. This average was three hundred and eighty-two feet. Liebke kept the paper for several days, giving it a careful examination, and, "on the strength of that scale bill," as he expresses it, agreed to pay $2,750 for the entire lot. The

Digitized by Google

following papers were thereupon delivered by defendants to the plaintiffs: —

St. Louis, October, 15, 1878.

Messrs. Liebke & Schrage,

Bought of Methudy and Meyer,
Lumber Commission Merchants,
No. 202 South Fourth Street.

520 Walnut Logs	. . . .	$2,750 00
50 Poplar Logs	. . . .	0,000 00

Received notes, sixty and ninety days, and four months from date in payment of above.

METHUDY & MEYER.

"We guarantee the above amount of walnut logs to be in Reelfoot Creek or its tributaries, also our title to same, and, also, that same are free of all incumbrances, excepting a claim which T. Sowell will have of $50 when logs are delivered below Dyersburg bridge.

"METHUDY & MEYER."

"Five hundred and twenty logs being guaranteed in creeks, if more are there, this is to transfer our title to them also.

"METHUDY & MEYER."

And also the following as to the logs in Pawpaw Creek: —

"St. Louis, October 21st, 1878.

"*Messrs. Liebke & Schrage:*

"In our late sale to you of the Reelfoot walnut, we include all the Pawpaw walnut in the creek (about 50 logs) by you paying the stumpage and giving us hereafter such amount as you may think just and right.

"METHUDY & MEYER."

The notes given were paid by the plaintiffs at maturity. The petition avers that the logs fell far short of the dimen-

Digitized by Google

sions guaranteed by the defendants, so that their average yield of lumber was only two hundred and twenty-two instead of three hundred and eighty-two feet, per log. When the plaintiffs attempted to prove the deficiency, as realized after the purchase, the testimony was excluded, and the plaintiffs excepted. The learned judge held that the case was one in which all previous negotiations and undertakings were merged in the written contract, and that no guarantee could be considered which was not contained in the writings delivered by the defendants to the plaintiffs. In these writings nothing was said about the dimensions, or lumber yielding capacity of the logs.

There is a class of cases, exemplified by a large number of adjudications, in which it is held that the rule excluding parol testimony to vary the terms of a written understanding does not apply to a collateral obligation which involves no departure from the terms of the writing, and the proof of which would show what was the entire contract, whereof only a part was reduced to writing. The courts say that, where the writing does not on its face purport to show the whole undertaking, parol testimony is admissible to supply omitted terms. But it is not always easy to reconcile the various processes which discriminate between this class of cases, and that wherein it is assumed that the writing contains the entire contract.

Thus, in *Van Ostrand* v. *Reed* (1 Wend. 424), the defendants sold to the plaintiffs certain exclusive rights in a patented threshing machine, and delivered a bill of sale describing the machine, but containing no covenants. The plaintiffs attempted to show that, in making the sale, the defendants represented and guaranteed that the machine was a new and useful improvement, which was untrue. This attempt was forbidden; the court holding to the presumption of law that the writing contained the whole contract. Yet, in *Chapin* v. *Dobson* (78 N. Y. 74), the plaintiffs gave to the defendant an agreement in writing,

Digitized by Google

describing in detail certain machines which they were to furnish, and setting forth the method of delivery and the terms of payment; whereupon the defendant was permitted to show that, before the delivery of this writing, there was a parol agreement or guaranty, "that the machines should be so made as to work well, or satisfactorily, or, in case of failure, that they should be taken back and not paid for." We are at a loss for any test by which it may be determined that the instrument in one of these cases purported to contain the entire contract, while that in the other did not. We have examined a large number of cases, in which a similar lack of uniformity seems to prevail. It may be a fair general conclusion, that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case.

Without undertaking to review and harmonize the numerous decisions to which our attention has been directed, we may state in general terms that, in two Michigan cases, we find an application of principles which, in our view, should most fairly control the present controversy. In *Phelps* v. *Whitaker* (37 Mich. 72), a written order for a wind-mill, containing certain stipulations, was given upon the strength of representations made by the agent of the manufacturers and contained in a printed circular, concerning the working capacity of the mill. It was held, in an action for the price of the mill, that the order did not constitute such a contract as would exclude evidence of these oral and printed representations, as collateral guaranties, and of their breach. The court said: "It was also urged that such evidence, as to conversations, was open to objection, as tending to change and enlarge the terms of the written contract between the parties, by parol evidence. * * * Every principle, both of law and justice, should hold a party bound by, and responsible for the

Digitized by Google

representations, whether oral or written, which he holds out, and relying upon which, a party gives an order, as in this case." In *Richards* v. *Fuller* (37 Mich. 161), Stauffer sold to Hale, by written contract, "all the cherry, walnut, bass wood, white ash, and maple timber on all or any of the lands owned by Stauffer, in Caledonia township." Hale indorsed upon this contract an assignment to Richards of all his "right, title, and interest in and to the within bill of sale or contract." In a suit against Richards on the note given for the purchase, the defendant offered to show that certain statements and representations made by Hale, "with regard to the kinds and amounts of the logs sold," were untrue. The trial court rejected the testimony, on the ground that "the assignment and contract were in writing, and had been put in evidence, and therefore could not be varied by parol testimony." The supreme court reversed the judgment, holding that "the evidence was admissible, and should have been received for the purpose for which it was offered."

It would be difficult to maintain that the guaranty of the mill's working capacity, in one of these cases, or that with regard to the kinds and quantities of the logs, in the other, was any more clearly an unwritten part of an entire contract, than was the description of the logs by scale bill showing their size and producing capacity, in the case before us. It is incredible that any man in his senses, buying logs to be converted into lumber for commercial purposes, would fix and pay the price for a certain number, without knowing, or having the least regard for their sizes, or for the quantity of lumber to be got from them. Five hundred and twenty walnut logs of one size may yield twice, or even five times, as much lumber as the same number of another size or average. The plaintiffs had never seen the logs, and bought solely upon the defendants' representations of what they were. It is, therefore, not

Digitized by Google

unreasonable to say, that a written contract which omits all mention of so essential an element, does not upon its face purport to contain the entire agreement made between the parties. The rule which excludes parol testimony applies whenever it may properly be assumed that the parties have put in writing all that they intended to be bound by. It was not devised to compel a purchaser to pay, for an article which he never intended to buy, the full price that he was willing to pay for the article he did intend to buy.

There is another view of the question here presented, whose tendency lies in the same direction. An elementary writer says, citing many authorities: "But, if there be a fraudulent representation by the vendor, going to the essence of the contract, — and on the faith of which the contract is made, — the vendee may, by an action on the case, or by a bill in equity, recover upon proof of such representations, although they be not embodied in the written contract." Story on Sales, sect. 360. The petition in this case does not ask for a recovery of damages for a fraudulent representation. Considering, however, that our code does not contemplate any statement of legal conclusions, and that, although the petition may state such conclusions improperly, or may fail to ask for the proper relief, the court will grant whatever remedy may be appropriate to the facts stated, we incline to the opinion that, even as the petition stands, the rejected testimony might have been properly admitted for the purpose of a recovery upon the ground last stated. In any event we think that the ends of justice would have been better subserved, and no controlling technical rule would have been violated, if the testimony offered had been permitted to go to the jury. With the concurrence of all the judges, the judgment is reversed and the cause remanded.

Digitized by Google

STATE OF MISSOURI, Respondent, v. THOMAS MURPHY, Appellant.

May 29, 1883.

CRIMINAL LAW—INSTRUCTIONS—ASSAULT.—Evidence by a defendant on trial for an assault with intent to kill, that he did not intend to hurt or kill any one, warrants an instruction for a common assault, though the evidence is that he deliberately fired a pistol at a crowd of men, striking and tearing the clothes of one of them.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Reversed and remanded.

M. F. TAYLOR, for the appellant.

LEWIS, P. J., delivered the opinion of the court.

The defendant was convicted upon an indictment for assault with intent to kill. The testimony for the state tended to establish the commission of the offence, as charged, by shooting at the prosecuting witness with a pistol, so that the bullet passed through the coat and vest of the witness. A fight was going on between other parties, one of whom was a friend of the defendant. The defendant, testifying in his own behalf, said: "I saw them still holding McVey, and others coming towards me. Then I pulled out my pistol and fired into the crowd. I did not aim at any of them, and I wanted them to keep away from me, and to make them turn McVey loose. I did not intend to hit anybody. I had no intention of killing any one or hurting any one. I wanted to scare them and make them keep away from me and turn McVey loose."

The court, of its own motion, gave apt instructions concerning the offence of assault with intent to kill, as defined by the Revised Statutes (sect. 1263), but gave no instructions as to a common assault, as defined by the Revised Statutes (sect.

Digitized by Google

1565). The case is an exact paralell with *The State* v. *Tate* (Mo. App., No. 2476), in which this court, following to its necessary result the decision of the supreme court in *The State* v. *Banks* (73 Mo. 592), held that the conviction was erroneous. We have nothing to do with the proposition that the defendant's testimony was at war with moral possibilities, and with the common law. It must be held that the jury might rationally have found that the defendant fired into a crowd of men, with a deadly weapon, without intending that the bullet should hit any one; in other words, that he did not intend the natural and necessary consequences of his act, since he so testifies. Upon authority of *The State* v. *Banks* and *The State* v. *Tate* (*supra*), the judgment is reversed, and the cause remanded. All the judges concur.

BENJ. LYNDS ET AL., Appellants, *v.* WILLIAM G. CLARK, Respondent.

May 29, 1883.

1. DAMAGES — NEGLIGENCE — TRESPASS. — A petition which states that the plaintiff was building a house under a contract to finish the same within a given time or forfeit a sum certain for a delay beyond such time, and that by reason of the adjoining owner's negligence his wall fell upon the plaintiff's materials and occasioned loss by delaying the work, states a good cause of action.
2. —— It is immaterial that, on such a state of facts, the plaintiff could not have recovered in an action of trespass at common law.
3. —— CONTRIBUTORY NEGLIGENCE. — The mere fact that the plaintiff proceeded with the work after he knew the dangerous condition of the wall and after the defendant had promised to remove it, was not such contributory negligence as will prevent a recovery.
4. —— The plaintiff, on the facts, might presume that the defendant would exercise ordinary care, and he took only the risk of injury from pure accident.

APPEAL from the St. Louis Circuit Court, LINDLEY, J.

Reversed and remanded.

Digitized by Google

P. R. FLITCRAFT, for the appellants.
ALEX. MARTIN, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case alleges that the plaintiffs were copartners as builders; that on September 13, 1880, a building owned by the defendant, on his lot in St. Louis, was nearly destroyed by fire; that before October 18, 1880, plaintiffs had contracted with one Thompson to erect for him a building on a lot immediately adjoining that of defendant, and to furnish the material for the same; that plaintiffs were erecting this building and working upon it with their employees on October 18, 1880; that the north wall of defendant's building on the adjoining lot, owned and occupied by defendant, was left standing in a dangerous condition from the date of the fire by the carelessness and negligence of defendant; and that on October 18th, without any fault of plaintiff, this wall fell upon the building, which they were erecting, and crushed in its walls, and knocked down and destroyed the bricks of which they were composed; that the joists and timbers used in the construction of said building were thereby broken and damaged, and lumber, window frames, sash, door frames, and doors, used and to be used by plaintiffs in the construction of the building, and also other building material belonging to plaintiffs, were thereby broken and destroyed to the damage of plaintiffs, $500. That, by the falling of this wall a great quantity of brick, mortar, and rubbish was thrown upon the building being erected by plaintiffs, causing them a damage of $200 for expenses in removing the same; that by their contract with Thompson, plaintiffs were bound to have the building, which they were erecting for him, completed by a day fixed, or, in case of failure, to forfeit to him a large sum of money for each day that said building remained unfinished after the day named in the contract for its completion; that, by

Digitized by Google

the falling of the wall upon the building, plaintiffs were delayed in the prosecution of the work, compelled to employ an additional force of laborers, greatly to their loss, and were unable to complete the building within the time limited in the contract; by reason of all which, they were further damaged $500. Judgment is asked for the sum of $1,200. The answer was a general denial. At the close of plaintiffs' case, the court, at the instance of defendants, gave an instruction, that, on the evidence, the plaintiffs were not entitled to recover. Plaintiffs took a non-suit with leave, which the court afterwards refused to set aside.

The plaintiffs introduced evidence tending to show that defendant owned a five-story building in St. Louis, with a high gable, and that one Thompson owned a building adjoining, on the north. The wall between the buildings was a party wall, up to the height of Thompson's building, which was two stories lower than that of defendant. These two buildings were partly destroyed by fire on September 13, 1880. The north wall of defendant's building was left standing in a dangerous condition. Thompson, immediately after the fire, made a contract with plaintiffs to restore his building complete, as before the fire, for $6,000; the building to be completed by a day named, and plaintiffs to forfeit $10 a day for all delay in completing the building after that time. Plaintiffs at once set to work on the Thompson building. They repeatedly called defendant's attention to the dangerous character of the wall. The wall was highly dangerous and liable to topple at any time. Plaintiffs' workmen, on some occasions, left their work on account of this. Defendant repeatedly promised to remove the wall, and admitted that it was dangerous, but nothing was done about it. Plaintiff Benjamin Lynds says, that he thought that when the wall fell it would fall south, away from Thompson's lot. On October 18th, the gable and upper part of defendant's wall fell into the Thompson lot, breaking off at a point twenty feet above the line at which

Digitized by Google

it ceased to be a party wall. At the time of the fall plaintiffs had made considerable progress in rebuilding the Thompson house. Various materials, belonging to plaintiffs, and lying on the Thompson lot to be put into the house, such as door and window frames, were broken; the walls of the house in progress of erection were knocked down to a great extent and the bricks and joists and materials in them were damaged; this, and the cost of relaying the walls, is estimated at $476; it cost $50 to clear away the rubbish; and as the work was delayed by the accident till it was too cold to plaster the house without fires, stoves, fuel, and a janitor had to be furnished, at a cost to plaintiffs of $110. Thompson was entitled to a large amount under the contract for delay in completing the house, but accepted $175, which was paid to him as a compromise by plaintiffs. After the wall fell, plaintiffs completed the Thompson house according to contract. Defendant was in possession of the lot on which the union wall stood at the time of the accident.

1. Respondent contends that this is an action for trespass upon real estate, and that, as plaintiffs had no estate or title in the realty claimed to have been injured, and as they were not in possession, or proprietors in any sense of the term at the date of the accident, there can be no recovery in this action.

It is true that the action of trespass lies only in favor of the person in possession of the realty at the time the trespass was committed; but this principle does not seem to be decisive in the present case. The question is not as to the common-law form of action, but, whether, upon the allegations and proofs, a case is made out of a wrong done to plaintiffs by the negligence of defendant for which damages may be recovered. If plaintiff's horse, by the permission of Thompson, had been on Thompson's lot, and defendant's wall, by the carelessness of defendant, had fallen and killed

plaintiff's horse, it does not appear why plaintiff might not recover, though he had no interest in the soil on which the horse stood. It is true that the action would not be in trespass, but in case; but the common-law forms of action being done away with, we are concerned only to see whether the petition sets forth a good cause of action under the code, and whether there is substantial evidence to support its material allegations. It is by no means clear, on the facts stated, that plaintiffs would have had a common-law action of trespass for the injury done to the building. For an injury to real property in possession, trespass was the proper remedy. Plaintiffs were occupiers of the lot for a special purpose, and if they had been erecting a building upon the lot, which was their own when erected, they might have maintained trespass; but where the plaintiff's interest in the property injured is something else than an absolute interest, case is the remedy at common law. It might be said that though the materials injured belonged to plaintiffs, yet, as they were built into the house, they became part of the soil, and plaintiffs would no longer have such an interest in them as would enable them to maintain trespass. But, however that may be, when the joists and bricks were knocked out of the wall, they became personal property again. Plaintiffs were injured by their being destroyed as material. They were injured by the damage to the frames and material that had never been in the house; they were injured by being prevented from fulfilling their contract, and from being compelled to proceed with their work under circumstances of greater expense. If this injury proceeded from the negligence of defendant as its efficient cause, we do not see why they have not a cause of action. It is clear that the owner of the house and lot has none. She has been compensated for the delay in completing the building; any injury in that respect was to fall upon plaintiffs under the contract, and it fell on them alone. This action is not for

Digitized by Google

the damage done to the building of Thompson, or any injury to his real estate, but for an injury to the property and the property rights of plaintiffs whilst lawfully on Thompson's lot, occasioned by the negligence of the adjoining proprietor.

2. We do not think that the fact that plaintiffs knew that the wall was dangerous, and nevertheless went on, under their contract with Thompson, to rebuild the house on his adjoining lot, on the faith of defendant's promises that he would remove the wall, was such evidence of contributory negligence as to warrant the court in taking the case from the jury. Thompson had a right to use his lot, and might lawfully contract with plaintiffs to rebuild; their contract with him compelled them under heavy penalties to proceed with their work. They could not, without committing a trespass, enter upon defendant's lot to remove his shaky wall, and they seem to have proceeded on the faith of his promise that he would remove it. It does not appear that they could have shored it up, or by any reasonable diligence prevented its fall. The property of plaintiffs was exposed to hazard, according to the testimony, whilst they were in the ordinary exercise of their rights on Thompson's lot under a license from him, which license was granted to them by Thompson under the ordinary exercise of his rights. After the lapse of a reasonable time to remove the wall, and after due notice, it would seem that plaintiffs might proceed with the building. They took the risk of an injury from pure accident, but not the risk of injury from the neglect of defendant to do his duty by exercising ordinary care not to injure the adjoining property by maintaining a nuisance upon his own lot. Plaintiffs had a right to presume that defendant would exercise ordinary care. *Brown* v. *Lyon*, 31 Pa. St. 510.

We think that the judgment should be reversed and the cause remanded. All the judges concur.

Digitized by Google

14 80
126m 220

L. A. COQUARD, Respondent, *v.* J. CARRIE MARSHALL, Appellant.

May 29, 1883.

1. STOCKHOLDERS. — Shares of stock having, among other things, been allotted, under the statute, to a widow, out of her husband's estate, and an order of distribution made and the estate settled, she having assented to the order and accepted a part of the property so allotted, became a stockholder and liable to a creditor of the corporation.
2. —— This liability attaches though she had not actually received the stock, and though there had been no transfer on the books of the corporation to her or to the administrator.
3. —— The creditor's failure to prove up the claim, which had matured, against the deceased stockholder's estate is no bar to an action against the distributee of the stock.
4. —— A creditor who first sues a stockholder does not thereby acquire an indefeasible priority.
5. —— That proceedings by other creditors against the stockholder are pending is no defence to the action.

APPEAL from the St. Louis Circuit Court, BOYLE, J.

Affirmed.

KERR, GIBSON & KERR, for the appellant.

GILLIAM & FERRIS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was a motion for execution against defendant, as a stockholder in the Butchers and Drovers' Bank. On hearing, the trial court ordered execution against defendant.

The facts are embodied in an agreed statement, and are substantially as follows: —

Plaintiff obtained judgment, on November 4, 1881, against the Butchers and Drovers' Bank, for $1,554.09. The bank is insolvent, and execution was returned *nulla bona*. This proceeding was instituted in June, 1882.

Defendant is the widow of Alexander Marshall. On November 15, 1875, D. K. Ferguson, qualified as admin-

Digitized by Google

istrator of Marshall, and gave due notice of his letters; and made final settlement of the estate on December 28, 1877; and was then ordered to make distribution. Marshall, when he died, owned thirty shares of stock in the Butchers and Drovers' Bank, which were duly inventoried as one certificate, No. 91, for thirty shares, $100 each, $3,000. Fifty per cent of the face had been paid. There had been no assessment beyond that sum. Defendant, on October 20, 1876, filed in the probate court her election as widow, under the statute, duly acknowledged, as follows: "I, Carrie Marshall, widow of Alexander Marshall, do elect to take all the real and personal estate which came to said Alexander Marshall, deceased, by right of our marriage absolutely; and one-half of the real and personal estate belonging to my said husband at the time of his death, absolutely, in lieu of dower of the one-third part of all lands whereof my said husband, or any other person to his use, was seized of an estate of inheritance at any time during our coverture, to hold and enjoy during my natural life." No part of the personalty came to Marshall in right of his marriage. In addition to the Butchers and Drovers' stock, the administrator, on final settlement, was charged with other stocks and bonds, of the actual value of $10,000. On April 15, 1878, the probate court appointed three commissioners to divide the personal estate of Marshall, who died without children. These commissioners, in their report, allotted to defendant, in lieu of her undivided interest in said estate, among other stocks, bonds, and notes, fifteen shares of Butchers and Drovers' Bank stock, of the face or par value of $100 per share. This report, filed July 11, 1878, was approved on the 20th of same month. Defendant received of the other stock, bonds and notes, to the value of $5,000. The Butchers and Drovers' Bank stock has never been transferred to defendant on the books of the bank. The bank ceased business on July 12, 1877.

Digitized by Google

1. In *Roeder* v. *Knoebel* (12 Mo. App. 587,) we decided that, where an executrix inventoried certain stock as belonging to the estate, received this stock as residuary legatee, and so stated on final settlement, and had received four dividends on the stock, whether as executrix or distributee, these facts constituted her a shareholder, and liable as a shareholder to creditors of the corporation; and that it is immaterial that the stock was not transferred to her on the books of the company; and that the fact that the debt sued ón had matured against the estate of the intestate when the bank made its assignment as an insolvent, and that it was not proved against that estate, is no bar to the claim against the distributee as holder of the stock.

2. There can be no doubt that the title to the stock passed to the defendant. The proceedings for partition of the personalty were in conformity with the statute. Rev. Stats., sect. 247. No exceptions were filed to the report of commissioners. Section 249 provides that the order made settles the claims of the distributee. The order was not appealed from. Defendant received $5,000 of property under the order of distribution, and must be taken to have assented to it. The property in the stock passed. After the order the administrator held the certificate of stock for the distributee, and was bound to deliver it to her on demand.

3. The answer of defendant set up that at the October term, 1881, of the circuit court, one Reel, as a judgment-creditor of the bank, sued defendant as distributee of her husband's estate, alleging that the stock received by her from the estate was unpaid, and that this suit is pending. But the pendency of this other action was no defence to plaintiff's motion.

The creditor who first sues acquires no indefeasible priority. *Manville* v. *Roever*, 11 Mo. App. 317.

The judgment is affirmed. All the judges concur.

Digitized by Google

CHARLES A. GITCHELL, Appellant, v. FRED MESSMER, Respondent.

May 29, 1883.

1. ACTIONS — BACK TAXES. — A proceeding for the collection of back taxes is not a proceeding *in rem*.
2. BACK TAXES — PARTIES. — The owner's interest in real estate assessed for taxation is not affected by a judgment in a proceeding to collect back taxes, to which proceeding such owner was not a party.
3. —— EJECTMENT. — A judgment against a husband for back taxes on land belonging to the wife, in an action to which she is not a party, and a sale thereunder will not entitle the purchaser to recover in ejectment against the husband who is tenant by the curtesy initiate.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

HERMANN & REYBURN, for the appellants.

JOSEPH S. DOBYNS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was ejectment. The answer was not guilty. The cause was tried by the court without a jury, upon an agreed statement of facts. The finding and judgment were for defendant. The action was originally against Socrates Newman and Messmer, but plaintiff dismissed as to Newman.

The facts are these: In 1855 Lina Vitalis owned the land in question in fee. She then married Socrates Newman. Children born of the marriage are living, and Newman and his wife are now living. In 1865 Newman and wife leased these premises to Bigelow & Jeffs, for ten years, these lessees to pay all taxes. Jeffs assigned his interest in the term to Bigelow & Griffin. The lease was forfeited for failure to pay taxes. Bigelow became tenant from month to month, in September, 1875, and until February, 1880,

Digitized by Google

when defendant, Messmer, became tenant from month to month, paying the monthly rent to Mrs. Newman. Newman made no return of the property; but during the years 1872, 1873, 1874, 1875, 1876, and 1877, it was listed for taxes in the name of Socrates Newman as owner, and Bigelow & Griffin, lessees.

In 1878 the state, at the relation of the collector, brought suit against Socrates Newman, Bigelow, and one Hilton, for back taxes on this property, delinquent for 1872, 1873, 1874, 1875, and 1876. In this suit, judgment was obtained in the usual form; and plaintiff purchased at the execution sale under that judgment, and received a deed from the sheriff, and brings this action for possession.

Hilton was a judgment-creditor of Socrates Newman, whose claim was satisfied. It appears, from what has been said, that Bigelow's interest in the premises had ceased before the present suit was commenced.

A proceeding under the existing revenue law to collect back taxes, is a proceeding *inter partes*, and not a proceeding *in rem*. It does not affect those not made parties to it. The owner of the real estate must be brought in, or his interests are not affected by the sale. *Boatmen's Bank* v. *Grewe*, 13 Mo. App. 335; *Gritchell* v. *Kreidler*, 12 Mo. App. 497.

Mrs. Newman owned the property in question in fee. Her husband was tenant by the curtesy initiate. The husband is jointly seized of his wife's estate. During the existence of the coverture, he is not tenant by the curtesy, but only seized by right of his wife. If there be a disseisin, it is of the joint estate. He is not solely seized for life of his wife's lands, but jointly with her. His possession is her possession. It is as her protector and representative that he is entitled to possession of her lands. *Valle* v. *Obenhause*, 62 Mo. 81; *Bledsoe* v. *Simms*, 53 Mo. 308. And, under the statute, the interest of the husband in his

Digitized by Google

wife's lands can not be sold for his sole debts; nor can the rents be seized for his debts; nor can he, without her concurrence, sell the rents of her land, nor the land, or any interest in it, which he acquired by marriage; nor release the tenant of any obligation incident to his tenancy. Rev. Stats., sect. 3295; *Silvey* v. *Summer*, 61 Mo. 253.

If plaintiff could recover in the present action, he would dispossess, not Socrates Newman, the defendant in the execution under which plaintiff purchased, but Mrs. Lina Newman, who is a stranger to the action in which the judgment was rendered under which plaintiff claims. On the undisputed facts of the case Mrs. Newman appears to have the title to the property on which defendant has levied his execution; and to be in possession through her tenant. We think that it conclusively follows, from what has been determined by this court in *Gritchell* v. *Kreidler*, 12 Mo. App. 497; that, upon the facts of this case, plaintiff is not entitled to dispossess Mrs. Newman. If Socrates Newman had had a life estate, and Lina Newman the remainder, a different case would be presented. But the fact is that Mrs. Newman is in possession, and the land is hers. The right to her land, which her husband acquired by marriage, was not a life estate carved out of her interest in the land. As she was not a defendant to the tax suit, her interests are not affected by the judgment, and none of her rights in the land passed to the plaintiff by his purchase under the execution issued upon that judgment.

We think that the judgment is for the right party, and that it should be affirmed. It is so ordered. All the judges concur.

Digitized by Google

14 86
124m265

MARY A. SAPPINGTON, Respondent, *v.* MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

May 29, 1883.

1. PLEADING — PRACTICE. — An answer is a waiver of all merely formal defects in a petition which states a cause of action.
2. —— CORPORATIONS — ESTOPPEL. — A corporation, by its answer and appearance to the merits, is estopped to deny its corporate existence.
3. NEGLIGENCE — DAMAGES. — Evidence that a fire began on the defendant's land just after the passage of its locomotive and spread to and burned the plaintiff's property on adjoining land, makes a *prima facie* case.
4. —— BURDEN OF PROOF. — A *prima facie* case being made, the burden is on the defendant to show that the escape of sparks from the passing locomotive was not the result of its negligence.
5. —— PRACTICE. — A *prima facie* case being made by the plaintiff and the defendant having shown that its locomotive was of the most improved pattern, the question of negligence is for the jury.
6. INSTRUCTIONS — PRACTICE. — A cause will not be reversed for omission or defects in an instruction if they are supplied or corrected in other instructions, and the instructions given are fair, consistent, and not misleading.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Affirmed.

H. S. PRIEST, for the appellant.

J. H. HAWKEN, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

Plaintiff alleges in her petition "that she is a freeholder owning lands in the county of St. Louis, and that defendant is, and was on September 5, 1881, a corporation owning and operating railroads under an act of the General Assembly of the State of Missouri, entitled an act to incorporate the Pacific Railroad Company, approved March 12, 1849, and subsequent acts amendatory thereto. That the line of defendant's road forms the southern boundary of her lands; That, on said 5th of September, defendant, whilst running

Digitized by Google

its cars upon said railroad, the locomotive attached to and drawing said cars was so carelesslyand negligently managed by defendant, its officers and agents, that fire was allowed to escape therefrom upon the right of way of defendant; that said right of way was so carelessly and negligently managed and maintained that said fire was communicated to the lands of plaintiff, causing great destruction and damage to the property, to wit: 320 fence rails, valued at $6 per hundred, aggregating the sum of $19.40; also, a complete set of oak timbers, framed for a large barn of the value of $175." The petition concluded in the usual manner. The answer is a general denial. There was a verdict and judgment for the amount claimed.

1. The defendant at the trial objected to the introduction of any evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action, and because its allegations are too vague and uncertain. We think that the objection was properly overruled. It is enough that the substantial averments are there. All formal defects are waived, when defendant fails to demur and answers over. The petition is inartificial. It is objected that it nowhere alleges in direct and positive terms that the property destroyed was the property of plaintiff. But we will not, after a trial on the merits, turn the plaintiff out of court because the word "the" in a petition is written instead of "her," when there has been no demurrer, and the meaning of the pleader is obvious, and there has been no surprise, and defendant has not been prejudiced. As to the objection to the allegation as to the management of defendant's right of way, that it is the statement of evidence, or of a conclusion of law, and not of a fact, we see nothing in it.

2. It is objected that the incorporation of defendant is denied by the answer, and that it was not proved on the trial. Defendant having appealed and answered, is estopped to deny its own existence. *Witthouse* v. *Railroad Co.* 64 Mo. 523. If it claims that it is improperly sued as the

Digitized by Google

"Missouri Pacific Railroad Company," and that its name is that under which it was originally incorporated, as set out in the petition, it should have set this up in answer, and, at the same time averred its real name.

3. The plaintiff introduced evidence tending to show that the property destroyed consisted of fencing on her farm adjoining the railroad company's fence, and the timbers of a barn on her premises, blown down before the fire, and that it was of the value stated in the petition, and was in her possession at the time of the fire; that the fire originated on the defendant's right of way; spread then to Ead's property, and thence to that of plaintiff, at a distance of two hundred yards from the track; that the defendant's right of way had been mowed a month before the fire, and that the grass and weeds had been left there to dry just as they fell; and that the fire burst out on defendant's right of way in this dry stuff just after a locomotive of defendant's passed; and that no grass or rubbish had been thrown from plaintiff's premises on to defendant's right of way.

On behalf of defendant, the engineer of the train which passed just before the fire, testified as to his skill and competency, and that the fireman of the locomotive in question was also skillful and competent; that they ran the engine carefully past plaintiff's place at the time spoken of by plaintiff's witnesses; and that the smoke stack and smoke arrester on the engine at the time were the best known in use to prevent the escape of fire. The smoke stack inspector of defendant testified that the engine in question was examined by him, and that the smoke stack and appliances for preventing the escape of fire were in good order, both just before and just after the fire in question. The section foreman of defendant testified that large quantities of dry grass, weeds, and brush had been thrown on defendant's right of way from adjoining lands, and that the fire started in these weeds, burned defendant's fence, and spread thence to the adjoining lands.

Digitized by Google

The court refused an instruction asked by defendant, in the nature of a demurrer to the evidence.

The court, at the instance of plaintiff, instructed the jury that "if they believe that fire was set out by the engine of defendant, and further believe that rubbish and dry grass was permitted by defendant to accumulate and remain upon their right of way, they shall find for plaintiff, unless the evidence has also shown that plaintiff's negligence equally contributed to the origin of the fire, or that defendant was then using the best appliances known to prevent the escape of fire from its engine."

At the instance of defendant, the court instructed the jury: "That if the evidence has shown the defendant's locomotive, complained of in this case, was in good repair, and supplied with the best appliances to prevent the escape of fire then known to be in use, and that it was at the time in charge of competent and careful men, who were exercising care and caution at the time, then the plaintiff must show other and further acts of actual negligence on the part of defendant;" and: "If the evidence has shown that plaintiff permitted dry grass and weeds to accumulate and remain on her land adjacent or adjoining defendant's right of way, and that this was an inducement as to the origin and spread of the fire, then plaintiff was guilty of such contributory negligence as to equal the negligence of defendant in allowing dry grass and weeds to accumulate and remain on its right of way, and if this has been proven to the satisfaction of the jury, there can be no recovery."

The court also gave an instruction, of its own motion, which is not set out.

The evidence that fire burst out amongst dry grass on defendant's right of way, just after the locomotive of defendant had passed along, was sufficient to warrant the inference that this fire was communicated by sparks from the locomotive. This, and proof that the fire spread to the adjoining

Digitized by Google

property of the plaintiff, made out a *prima facie* case against the company, and threw upon them the burden of proof to show that the escape of sparks was not the result of negligence on their part. To this end it was competent to show that the engine and machinery were of the most improved pattern and make, and managed carefully at the time by competent and skillful servants. But if the sparks escape through the most approved arrester, and careful and competent servants are employed, the inference that this escape of sparks is to be attributed to carelessness in the management of the train, is a fair and reasonable inference. *Kenney* v. *Railroad Co.*, 70 Mo. 243. And, though the servants of defendant swear that the machinery was perfect, and of the most improved pattern, and that they were competent and careful at the time, the jury may take into consideratiom the physical facts of the case, and are not bound to accept this testimony as conclusive, merely because it is not directly contradicted by other witnesses; and, if the jury find for plaintiff, and the plaintiff has made out a *prima facie* case, and the case was fairly put to the jury, and the trial court has refused to interfere, the appellate court ought not to disturb the judgment as unsupported by evidence. The jury is not bound to believe, contrary to their own experience, that sparks from an engine in perfect order, of the most improved pattern, will escape from a passing engine, without any negligence or incompetence on the part of the fireman or engineer, so as to set fire to neighboring property, merely because the fireman and engineer swear that they were careful and competent, and because officers of defendant testify that the machinery was of the best kind, and in good order. Where sparks have escaped, and a fire, commencing with plaintiff's property, has ensued in consequence, the matter is for the jury. *Brown* v. *Railroad Co.*, 13 Mo. App. 462.

4. It is contended that the instruction given for plaintiff was bad, in this respect, that it did not require the jury to

Digitized by Google

find that the fire from the locomotive set the grass on fire, and that it speaks of "the best appliances known" and not the best appliances known and in use at the time of the accident. But, in view of the testimony and the instructions given for defendant, we do not think that this instruction, though carelessly drawn, was calculated to mislead the jury. An instruction given by the court of its own motion, is omitted from the record. If defects or omissions in one instruction are supplied in another and the instructions are consistent, and not misleading, and the instructions, taken as a whole, fairly put the case to the jury, there is no reversible error in the instructions. *Whalen* v. *Railroad Co.*, 60 Mo. 323. The instruction complained of was defective; but we can not see that it was misleading, in view of the evidence in the case, and the fact that all the judges instructions are not before us.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

14	91
44	181
44	189
14	91
73	243

CALVIN HASKELL, ASSIGNEE, Respondent, v. MILES SELLS, Appellant.

June 12, 1883.

1. CORPORATIONS — STATUTES. — A business corporation organized in September, 1879, could not be incorporated under Article VIII. of the revision of 1879, which did not go into effect until November following.

2. —— SUBSCRIPTION — VARIANCE. — There is no variance between a subscription list under the name, "The Missouri Cotton Seed Oil Company," and the articles of incorporation which add thereto the words, "of St. Louis."

3. —— An agreement to take shares in a corporation to be formed, enures to the benefit of the corporation when organized in pursuance of the subscription.

4. —— The shares of stock being for $100 each, a subscription of $1,000 is not void for uncertainty.

Digitized by Google

5. —— ASSIGNMENT. — The corporation's right of action against a subscriber to shares of its stock passes to its assignee under a general assignment.

6. —— CONTEMPORANEOUS AGREEMENTS. — A contemporaneous agreement with the promoter, which gives the subscriber an option to take the shares, is no defence to a subscription unconditional on its face and on the faith of which others have subscribed.

7. —— LIABILITY OF STOCKHOLDERS. — Liability of a shareholder having become fixed by a subscription can not be avoided by giving notice to the promoter that the subscriber declines to take the stock.

8. —— Such a liability is not affected by the subscriber's failure to meet subsequent calls or to take part in proceedings of the corporation, or by the fact that no calls were made upon, or stock issued to, him.

9. —— TRUSTS. — Stock in a corporation is a trust fund for the benefit of creditors of the corporation, and is created by an agreement to take shares of stock.

10. —— POWERS OF OFFICERS. — A contract to take shares of stock can not be released by the officers of the corporation without consideration and in fraud of the rights of the creditors and of the shareholders of the corporation.

APPEAL from the St. Louis Circuit Court, ADAMS, J.
Affirmed.

THOS. C. FLETCHER, for the appellant: Article VIII., of chapter 21, of the Revised Statutes of Missouri, went into effect on August 18, 1879. The appellant never became a stockholder. — *Beach* v. *Smith*, 30 N. Y. 116; *Excelsior Co.* v. *Strayner*, 25 Hun, 91. The signing of the memorandum sued on did not create the liability of a shareholder.—Thomp. on Liab. of Stock., sect. 105; *Mudgett* v. *Howell*, 33 Cal. 25. The alleged contract being repugnant to and contravening a statute, can not be enforced. — *Barton* v. *Plank R. Co.*, 17 Barb. 404; *Seneca Bank* v. *Lamb*, 26 Barb. 601. The company went into operation without full subscription of stock and without Sells' assent, and he is therefore not liable. 2 Redf. (5th ed.), top page, 549, sect. 242; Thomp. on Liab. of Stock., sect. 120; *Gargling* v. *Buechtel*, 41 Md. 325; *Hager* v. *Cleveland*, 36 Md. 476.

JOHNSON, LODGE & JOHNSON, for the respondent: A subscriber for stock is released from his subscription by a

Digitized by Google

subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the state. — *Nugent* v. *The Supervisors*, 19 Wall. 251, and cases cited; *New Haven, etc.*, v. *Chapman*, 38 Conn. 56; *Clark* v. *Monongahela, etc.*, 10 Watts, 364; *Delaware, etc.*, v. *Irick*, 23 N. J. L. 321; *Pacific, etc.*, v. *Hughes*, 22 Mo. 291. The subscription inured to the benefit of the corporation when formed. — *Lagrange* v. *Mays*, 29 Mo. 65. The right of action passed by the assignment. — *Schultz* v. *Sutter*, 3 Mo. App. 137; *Lionberger* v. *Broadway Bank*, 10 Mo. App. 499. A failure to give the notice of calls does not in any way affect a subscriber's liability upon his contract of subscription. — *Lake Ontario* v. *Mason*, 16 N. Y. 451; *Penobscot, etc.*, v. *Dunn*, 39 Me. 587. The secret agreement, as testified to by appellant, between himself and Kay and Tilden, two of the promoters of the company, relative to his taking the stock or not at his option, was in fraud of the rights of the other subscribers and void, and appellant can not claim any advantage therefrom. — *Pickering* v. *Templeton*, 2 Mo. App. 424; *Upton* v. *Tribelcock*, 91 U. S. 45; *Swartout* v. *The Mich., etc.*, 24 Mich. 389; *Ridgefield, etc.*, v. *Bush*, 43 Conn. 86. It is not necessary that a certificate of stock should have been tendered to the subscriber. — *Georgia R. Co.* v. *Ayers*, 56 Ga. 230; *Fulgum* v. *Macon R. Co.*, 44 Ga. 597.

BAKEWELL, J., delivered the opinion of the court.

Under the rule of court permitting this to be done (Rule XII.), the parties have agreed to a statement of the cause of action, the defence, the evidence, the rulings of the trial court, and the exceptions saved, which, being accompanied by a certificate of the trial judge, is to be treated in this court as the record.

The statement is as follows: The plaintiff is the assignee

Digitized by Google

of the Missouri Cotton Seed Oil Company. The plaintiff, as such assignee, brought his suit against the defendant, alleging, in substance, a contract on the part of defendant with his co-subscribers to take ten shares of the capital stock of said company under the name of the Missouri Cotton Seed Oil Company. The contract sued on and offered in evidence is as follows: —

"We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names to the capital stock of the Missouri Cotton Seed Oil Company — a company to be organized under the laws of the State of Missouri — and we severally agree to pay the said company the sum of one hundred dollars on each share. Twenty-five per cent to be paid on organization of the company. Twenty-five per cent to be paid on first day of September. Fifty per cent to be paid on the first day of October, or as soon thereafter as the board of directors shall call for it to be paid in.

"Dated this twenty-eighth day of July, 1879.

" Shares.		
" 200	Wm. V. Kay .	$20,000
50	John B. Tilden	5,000
50	H. C. McNeil, Friars P., Miss.	5,000
50	Calvin Haskell	5,000
—	Miles Sells	1,000
—	G. J. Shaw	1,000
10	Web. M. Samuel	1,000
20	W. H. Waters	2,000
10	Given Campbell	1,000
25	Chas. T. Worthington, Liota, Miss.	2,500 "

And alleging that the other persons, whose names are appended to said paper, subscribed to the same in consideration of the alleged undertaking on defendant's part. That afterwards, to wit, about the twenty-third day of September, 1879, the company was duly organized under the name of the Missouri Cotton Seed Oil Company of St. Louis, and com-

Digitized by Google

menced business in St. Louis; that the other subscribers to the said paper, Kay, Tilden, Haskell, Shaw, Waters and Campbell, each accepted the shares subscribed for by them severally, and paid for the same; that the corporation, on the 29th of September, 1879, duly adopted a by-law, as follows: —

"The capital stock shall be paid in upon such assessments and at such place as the board of directors may order, a written or printed notice of which shall be given each stockholder by the secretary, and any subscriber who fails to pay any such assessments so ordered, after thirty days' notice, shall forfeit to the company the amount, if any, already paid on his stock, if the company so elect;" that, afterwards, on the same day, the board of directors passed a resolution ordering and directing an assessment on the capital stock, to be paid as follows: fifty per cent on the 1st of October, 1879; twenty-five per cent on the 15th of October, and twenty-five per cent on the 10th of November, 1879; that the defendant did not pay any part of his subscription at any time; that the company afterwards became insolvent, and about the 24th of February, 1881, made an assignment in due form to plaintiff, by and under the name of the Missouri Cotton Seed Oil Company, for the benefit of his creditors, and that the assets of the company are wholly inadequate to the payment of the debts, and demanded judgment for one thousand dollars and interest.

The answer of the defendant was a general denial. The cause was tried by the court without a jury. The signature of defendant to the paper sued on was admitted. It was then offered in evidence and objected to by defendant because there are no number of shares set opposite defendant's name, and because there was not shown the existence of a corporation by the name of the Missouri Cotton Seed Oil Company; but the court overruled the objection, and the same was read as hereinabove set out, to which opinion and decision of the court in admitting the same, the defend-

Digitized by Google

ant excepted. Plaintiff then read the articles of incorporation of the Missouri Cotton Seed Oil Company of St. Louis, in the usual form, the same not being signed by the defendant or any mention of his name appearing therein for any purpose, and then read the certificate of incorporation issued by the secretary of state, in due form, to the Missouri Cotton Seed Oil Company of St. Louis, and in which there is no mention of defendant as a corporator; to all of which defendant objected, and being overruled, duly excepted.

The assignment of the company to plaintiff was admitted as alleged in the petition, and that he is the duly qualified assignee of the corporation; that whatever cause of action the corporation might have had, if any, against defendant, passed to plaintiff; that the company was insolvent.

Plaintiff Haskell testified that he subscribed and paid for fifty shares, $5,000; that he never saw or had any conversation with defendant previous to the organization of the company, nor subsequently.; that he subscribed at the solicitation of Tilden and Kay; he never knew of any meeting of the subscribers for stock, for the purpose of organizing the company, or for any other purpose; that Kay called on him about the 1st of October, 1879, and he paid his subscription; he received his certificate of stock; Shaw, Campbell, Waters, himself, and Waller, paid in full, and Mr. Kay paid in part; that he was treasurer of the company the second year, and a director; that the company carried on the business of manufacturing cotton seed oil from the 1st of October, 1879, to the 17th of January, 1881. It was admitted that the stock certificates were in the name of the Missouri Cotton Seed Oil Company; that the company did business under that name, took a lease to its factory property, and made and executed the deed of assignment under that name. The minutes of the record of the proceedings of the board of directors was identified by Haskell and examined; it did not appear that defendant was ever present at a meeting of the board or of the stock-

Digitized by Google

holders, or was ever mentioned on the books as a stockholder. Plaintiff Haskell was a creditor of the company, and Kay's wife was also a creditor; he never demanded of defendant his subscription, nor spoke to him of it.

Given Campbell testified that he had subscribed for ten shares of the stock, and had paid for them and received his certificate of stock. He did not have any conversation with defendant on the subject at or before the time when he subscribed.

W. H. Waters testified that he had subscribed for twenty shares, $2,000, and had paid for them and received a certificate of stock. Never had any conversation with defendant in reference to the matter.

It was further admitted that Haskell, Waters, and Campbell signed the subscription after the defendant did; that they never consented to release him from the contract; that they never knew of any arrangement between the defendant and Kay to the effect that defendant was not to be held upon his own subscription, and that they testified that if they had known of such arrangement they would not have signed the contract.

The defendant, Miles Sells, testified that he signed the papers sued on after repeated solicitations of Tilden, and with the understanding between them that it amounted to an option for sixty days to take stock if he wanted it; afterwards told Tilden, on 'Change, and Kay that he would not be able to take the stock, and they said they would take it themselves; that the value of their machinery was considerably more than the amount of the stock they had taken; I never heard of the matter again; I never attended any meeting relating to the company nor received notice of one, and was never called on to pay anything, nor notified to do so, and never heard of it again until I was sued (the service of the writ was September 17, 1881), except a letter I received from Mr. Johnson (plaintiff's attorney) when I was at Spring Lake. All the talk I ever had about

Digitized by Google

it was with Tilden and Kay on 'Change. The paper I signed, Tilden said was a memorandum he was making up, and when I told him I could not take the stock, he said that was all right, and that was the last I ever heard of it till this suit was brought; that he signed for ten shares of stock; he did not know whether or not the company was organized at the time he told Tilden and Kay he could not take the shares of stock; that he told them within sixty days after the subscription; that he knew there was some kind of a cotton seed company organized, but whether it was the same company or not he never knew.

The court found for the plaintiff, $1,026.64, holding that there was a private arrangement between defendant and the prime movers in getting up the corporation, to the effect that he need not take the stock unless he elected to do so in sixty days; that the arrangement was not known to the other subscribers; that they relied on his subscription as being genuine; that though the defendant did not sign the articles of association, being unaffected by other consideration or by law; that no notice of assessment was necessary to defendant; that he was a defaulting subscriber to the stock; that his rights and liabilities are not affected by his non-participation in the organization or business of the company; that his liability was fixed by his subscription and the consequent organization of the company; that the rights of the parties were concurrent and dependent; that the organization of the company and the beginning of the contemplated business was an acceptance of the subscription; that the demand of a fixed indebtedness was not affected by the delay in the demand for it; that the name was not essential, and that the variance in the name was not material; and gave judgment for the plaintiff as above stated. There was a motion for a new trial, which was overruled, and exceptions duly saved, and an appeal prayed.

The parties agreed upon the foregoing statement for the purpose contemplated by Rule XII., court of appeals, and the judge before whom the case was tried, hereby certifies

Digitized by Google

the foregoing to be a substantial history of what occurred at the trial, and that the appeal has been perfected, and a bond approved as a *supersedeas.*

Counsel have printed this record for the convenience of the court. We find, on comparing this printed record with the original, an error in date. In giving the day on which the company was organized, "December" has been accidentally substituted for "September," which is the month in which the company was incorporated. It is claimed by appellant that the company was incorporated after the amendments to the corporation law embodied in the revision of 1879 were in force. There could be no doubt about this had the date been December. The real date was September 23, 1881; and we think it clear that at that date the corporation law in force was that to be found in Wagner's Statutes of 1872 (p. 332, Art. VII.)

Counsel for appellant argues that Article VIII., of chapter 21 of the Revised Statutes of 1879 went into effect on August 18, 1879, because it was passed as a separate revised bill, and that date was ninety days after May 20, 1879, the date of the adjournment of the legislature.

It appears from the note at page 805 of the Revised Statutes, that except as to seventeen chapters set out in the note, all of the seventy-three chapters of the first volume of the last revision were passed as revised bills. The chapters which contain the corporation law not being among the exceptions, were passed as revised bills, but it does not follow that they went into effect ninety days after the legislature adjourned; on the contrary, it seems clear that they did not got into effect, in their amended form, until the first of November, 1879.

The constitutional provision (Art. IV., sect. 36), and the general legislative provision (Rev. Stats., sect. 3149), are to the effect that laws go into effect ninety days after the adjournment of the session, unless there be an emergency clause to the bill. But the special provision as to the Revised Statutes of 1879 (Rev. Stats., sect 3168), is to the

Digitized by Google

effect that the Revised Statutes shall go into effect from 1st of November, 1879, except such acts, passed by the present General Assembly and incorporated therein, as shall, by their provisions, take effect at a different time, and until the Revised Statutes shall go into effect, as herein provided, the existing statutes shall continue in force. Article VIII. of the Revised Statutes "Of Manufacturing and Business Companies," contains many new sections, and many amendments, but there is no provision in that article, or in the general chapter "Of Private Corporations," of which it is a part, providing for its going into effect at a different time from the rest of the revision. The Missouri Cotton Seed Oil Company was, therefore, incorporated under the provisions of Article VII., of Wagner's Statutes of 1872, in force at the time, which differs from the subsequent revision of 1879 in many respects. It does not require, as does the later law (Rev. Stats., sect. 926), that the names and places of residence of the several stockholders, and the number of shares subscribed by each, shall be set out in the articles of agreement, a certified copy of the record of which is to be filed with the secretary of state, as the basis of his certificate of incorporation. This difference is important when we have to consider what acts, if any, looking to a rescission of the contract of subscription to the shares, were done or accepted by the corporation, the corporators, the other stockholders, or the defendant Sells.

There is nothing whatever in the point that the name of the subscription paper signed by Sells was "The Missouri Cotton Seed Oil Company," and the name in the articles of association "The Missouri Cotton Seed Oil Company of St. Louis." *Schaeffer* v. *Gruen*, 4 Mo. App. 115. Nor did the omission of the number of shares before the name of the subscriber render the contract uncertain, since the agreement fixed the value of each share at $100 and $1,000 was subscribed. That the right of the corporation against

Digitized by Google

Sells under his contract of subscription passed to the assignee, is not to be questioned. *Lionberger* v. *Bank*, 10 Mo. App. 499.

The subscription paper signed by Sells was an unconditional agreement to take a certain number of shares. This, *prima facie*, constituted the subscriber a stockholder. Thomp. on Stock., sect. 105. That there was no corporation in existence at the time the paper was signed is immaterial. The objection that there is no promise in such a case is satisfactorily met by the suggestion that the promise becomes definite and fixed when, in accordance with the expectation of the subscribers, the corporation is effected. *Comstock* v. *Hurd*, 15 Mich. 237. It has been decided, again and again, that contracts such as that sued upon here, enure to the benefit of the proposed company when incorporated, and can be enforced by it. *Lake Ontario, etc.*, v. *Mason*, 16 N. Y. 451.

The subscription of the defendant was unconditional upon its face. In contradiction of the writing, and after other subscriptions have been obtained on the faith of his, he endeavors to show an oral contemporaneous agreement between himself and two promoters of the company that he was to have an option of withdrawing within two months. Such a secret agreement, if it could be shown to contradict the writing, would be a fraud. We need not dwell upon this. *La Grange, etc.*, v. *Mays*, 29 Mo. 64; *Pickering* v. *Templeton*, 2 Mo. App. 429.

The liability of defendant as a stockholder having been once fixed, could not, of course, be avoided by mere notice by him to officers or promoters of the corporation that he declined to make good his agreement. Nor does it appear how the officers of the corporation, or the promoters, could release the defendant without the consent of the other subscribers. *Hughes* v. *Antietam, etc.*, 34 Md. 317. The subscription for shares of stock made the subscriber a stock-

Digitized by Google

holder, though he failed to meet the subsequent calls; and it made no difference that certificates of stock were not in fact issued. *Schaeffer* v. *Finn*, 46 Mo. 248. The failure to give notice of calls does not affect the subscriber's liability upon his contract of subscription. *Lake Ontario, etc.*, v. *Mason*, 16 N. Y. 451. Nor is it material that defendant never participated in any business meetings. 68 Pa. St. 429.

Stock is created by contract, in the simple form of subscription, or in any other mode. The agreement to take the stock imparts to it the quality of property; and, when created, the capital stock of a corporation is a trust fund for the payment of debts. The unpaid balances upon subscriptions are as much a part of the capital of the company as the money paid in. Credit is obtained on the faith of such subscriptions; and the directors can not, without a breach of trust, attempt, without an equivalant paid to the company, to release a subscriber from his obligation. *Fisher* v. *Seligman*, 7 Mo. App. 383.

Had the incorporation been made under the existing law (Rev. Stats., sect. 926), there might have been something in the objection that in the organization of the company the name of the defendant was omitted from the list of stockholders. This would have tended to show that his subscription was not accepted, and that he was in no way held out to the public as a stockholder. But as we have said, the law in force at the time of the subscription, and at the time of the organization of the company (1 Wag. Stats., p. 333, sect. 2) did not require that the constating instrument should give the names of the shareholders. We think that the facts in evidence warrant the judgment of the circuit court, and that it ought to be affirmed. All the judges concur.

Digitized by Google

H. A. HAEUSSLER, Plaintiff in Error, v. JAMES DUROSS, Defendant in Error.

June 12, 1883.

1. TENDER AND ACCEPTANCE. — A withdrawal by the plaintiff of money paid into court in discharge of the demand sued on is as an acceptance of a tender.
2. PRACTICE. — A plaintiff who so withdraws money can not afterwards claim that it was accepted merely as a payment on account.
3. —— A plaintiff who, in accordance with the profert, accepts money paid into court in discharge of the demand sued on thereby ends the suit and is liable for all costs which accrue thereafter.

ERROR to the St. Louis Circuit Court, THAYER, J.

Affirmed.

E. J. O'BRIEN, for the plaintiff in error.

HENRY HITCHCOCK, for the defendant in error.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case is substantially as follows: Plaintiff, for himself and all others in interest who may be joined herein, states that on March 15, 1876, Geo. W. Lubke conveyed to defendant a lot in the Grand Prairie common fields, particularly described, on which was erected "Elleardsville Hall." This lot was conveyed to Lubke in trust. Amongst the persons beneficially interested in the trust were Hymers, Massey, Sellers, and McGlenn. Defendant executed a declaration of trust, whereby he agreed to receive the rents and profits of the premises, pay all expenses of ownership, and distribute any surplus among the parties named in the declaration of trust, including those named above. The aggregate interest of the beneficiaries was $8,049.85; of which Hymers owned $1,447; Sellers, $95.45; Massey, $254, and McGlenn, $143. These four assigned to plaintiff all their interest in the trust, and he holds the same, of which defendant had notice. The

Digitized by Google

trust property has been disposed of by defendant, and the trust closed, and defendant has received, net, from the trust property $2,414.70, but has failed to pay over to plaintiff his proportionate share, which is $482, for which and interest he asks judgment.

The second count states that one of the terms and conditions of the trust was, that defendant should hold the premises during the pleasure of the creditors named in the declaration of trust, and pay over the proceeds to them in exact proportion to their respective claims; that the interests of the beneficiaries were as set out above; that defendant sold the property on October 11, 1881, for $4,000, and received the proceeds; that plaintiff is assignee of the four persons named above, and has demanded his proportionate share of the proceeds of the sale, which defendant refuses to pay. Plaintiff asks judgment for $1,000 and interest.

The third count, after setting up the matters of inducement in the other counts, alleges that defendant, by said declaration of trust, agreed that all questions as to the management of the trust property should be decided by a majority vote of the beneficiaries; that defendant, in March, 1878, and repeatedly since, was offered $5,000 for the property, and refused to sell; that, on January 25, 1881, a majority of the beneficiaries, by vote, directed defendant to sell, at private sale, before April 15, 1881, at a fixed price, and, as an alternative, to sell on June 15, 1881, at public auction. That, in violation of his agrèement, defendant refused and neglected to obey these instructions, and did not sell until, on October 11, 1881, defendant sold the trust property to his partner in business, and another, for $4,000, which was an inadequate price. For this plaintiff asks damages in the sum of $2,000.

The answer of defendant denies these charges, and sets up an agreement between himself and the beneficiaries under which the property was bought by him as trustee, and by

Digitized by Google

which the trustee was to assess all the beneficiaries *pro rata*, if the rents and profits should not meet the necessary expenses of the trust. He avers that one Gordon obtained judgment against the property on a mechanic's lien; that defendant by legal advice resisted this claim, but the lien was sustained in the court of appeals; and, the Elleardsville Hall Association being insolvent, defendant was obliged to pay this judgment to save the property; and, in order to meet the expenses incurred, he made a *pro rata* assessment, as provided by the agreement, which was paid by all the beneficiaries except plaintiff, who refused to contribute. That the property was sold on October 11, 1881, for $4,000, at the special direction of plaintiff and other creditors; and, after deducting a reasonable compensation for himself as trustee, defendant divided all the proceeds of the trust fund amongst the beneficiaries *pro rata*, who, except plaintiff, all received this *pro rata*, and discharged defendant from further liability about the trust. The answer further says that the *pro rata* of plaintiff for the four claims represented by him, is $704.65, which defendant tendered to plaintiff before the action, and now deposits in court, that plaintiff may receive the same pursuant to the tender.

The answer is accompanied with exhibits; amongst others, one which purports to be a statement of all items received and expended by the trustee from the inception of the trust, showing a balance in his hands of $704.65, being a dividend of 36 1/3 per centum due to Hymers, Sellers, Corby, and McGlenn, who have not made settlement.

The reply of plaintiff sets up that the agreement to change date of sale was not made until after defendant had failed to comply with the order of sale at the first date, nor until after defendant was sued by plaintiff; and denies that $653.95 is a reasonable charge for defendant's services; says that defendant had no right to pay the Gordon claim, or to borrow money for that purpose; and denies that defendant,

before the suit, offered to pay plaintiff anything, except on condition that plaintiff would sign a release.

The transcript further shows that on the 10th of March, 1882, the clerk of the court was ordered to pay to plaintiff $704.65, theretofore deposited as a tender to plaintiff; and that, on the 3rd of May, 1882, it appearing to the court that plaintiff has accepted the tender of $704.65, made by defendant with his answer, and deposited with the clerk of the court, and defendant has paid all costs up to the time of the deposit, and all costs made by defendant since, leaving due $2.70 costs, made by plaintiff since he accepted the deposit, it is ordered by the court that defendant go hence without a day and recover of plaintiff said $2.70, costs, etc.

It further appears that a motion for new trial was filed and overruled. The motion itself does not appear.

We do not see any error on the face of this record.

The object of this tender and payment into court was to enable plaintiff, if he saw fit, to accept the amount conceded by defendant to be due, so as to put an end to the litigation.

Appellant contends that his acceptance of the money paid into court is not to be taken as an admission that the rest of the demand was unfounded, and that he had a right to accept this money *pro tanto*, and continue the litigation.

But a tender must be accepted as made. The payment of money into court had the effect of a tender; and if the money is taken out of court by plaintiff, when expressly offered as in full of plaintiff's claim, plaintiff can not afterwards say that the tender was accepted, not as made, in satisfaction of the entire demand, but merely as a payment on account. And the proper practice where plaintiff elects to take the money tendered and paid into court in full of the claim, is to order the money paid over to him; and he is certainly liable for costs made by him after that date.

Digitized by Google

We have carefully examined all the authorities cited by plaintiff in support of his position, but we do not find that they give any support to it.

Storey v. *Krenson* (55 Ind. 401), is to the effect that a conditional tender is insufficient. *Eslow* v. *Mitchell* (26 Mich. 500) decides that mere tender, which does not pay the debt, may, nevertheless, discharge a lien. *Thomas* v. *Wiesmann* (44 Wis. 339), is to the effect that payment of part of a claim pending suit does not prevent the plaintiff from recovering the balance. In *Spaulding* v. *Vandercock* (2 Wend. 431), it is held that payment by defendant into court admits the cause of action to the amount paid in, but nothing more. These rulings are in accordance with what we understand to be the law of tender, but seem to be aside from the question presented by this record.

The case cited by appellant (*Sleght* v. *Rhinelander*, 1 Johns. 192,) goes only to this, that when defendant, in an action on a policy of insurance, under a rule of court, paid the premium into court under a count to recover the premium, the plaintiff, by taking this money out of court, was not precluded from proceeding for a total loss under the other counts of his petition, where there was an evident understanding between counsel at the time, though not reduced to writing, that this was done without prejudice to the right of plaintiff to proceed on his other counts. It was contended that the agreement, not being in writing, could not be set up, and that plaintiff was therefore concluded, but the court held otherwise. In *Hildyard* v. *Blowers* (5 Esp. 69), it was held that where money short of plaintiff's demand had been paid into court by defendant and taken out by plaintiff, it was admissible, in another action, to show *quo animo* this was done, and it was not to be taken, in the other action, as an admission that the rest of the demand was unfounded. But it was not held that this reception of the money did not conclude plaintiff as to his right to recover in the action

Digitized by Google

in which it was paid and received. The case was this: Plaintiff sued defendant, a dealer in coals, under a statute, for selling him coal and delivering short weight by sixteen bushels. There had been a former action in which the coal dealer had sued the plaintiff in the statutory action, for the coal sold and delivered. In this former action the buyer had paid into court the value of the coal, less the price of sixteen bushels. This the coal dealer had taken out of court; and in the statutory action it was urged that this was conclusive as to the short delivery. But Lord Ellenborough said, that as the act of taking the money in the suit for the value of the coal was the act of the attorney, he would be admitted to state that he had advised his client to take the money to avoid litigation, the amount being so small, and not as admitting a defective delivery. *Johnston* v. *Ins. Co.* (7 Johns. 315), merely holds that the payment of money into court under a rule, in an action brought under the common-law forms of action, was an admission of the cause of action as alleged in the declaration, and that the only question left would be the amount of damages. And this was undoubtedly the rule under the common-law practice, where money might be paid into court generally, or under this or that count. 1 Tidd Pr. 619.

But there is nothing, of course, in any of these cases which in the least militates against the well known rule that a tender must be accepted as made. Under the old system, the plaintiff, if he accepted the money paid into court, accepted it as paid. He accepted it in discharge of the count under which it was paid, or, if paid generally, as Tidd says, "when money is brought into court, plaintiff either accepts it with costs in discharge of the suit, or proceeds in the action." 1 Tidd Pr. 626. The effect of payment into court has always been held to be similiar to a tender; and when, as in the case at bar, there is a plea of tender accompanied by a *profert in curia*, together with a statement in the pleading that this sum is in full of all demands,

Digitized by Google

and all that defendant owes plaintiff on account of anything alleged in the petition, there can, we think, be no doubt, that if plaintiff, by withdrawing the money from court, accepts this tender, he accepts it as made, and that must end the litigation.

In the present case, the money was not tendered or paid into court in discharge of one count of plaintiff's petition, but in full of all for which defendant was liable on account of any matter growing out of his management of the trust for which plaintiff seeks to call him to account, and this is apparent from the pleadings.

The judgment is affirmed. All the judges concur.

---

14 109
53 8

A. E. ALEXANDER, RECEIVER, Appellant, v. JAMES S. ROLLINS ET AL., Respondents.

June 12, 1883.

1. NEGOTIABLE INSTRUMENTS — INSURANCE COMPANIES, POWERS OF. — Insurance companies have, in the general conduct of their business, the power to take, hold, and negotiate negotiable paper.

2. —— Stock notes of a mutual insurance company which are negotiable in form are negotiable in fact.

3. —— NOTICE — FRAUD. — A payment by the maker to the fraudulent holder of a negotiable note without notice of the fraud, discharges the maker from liability thereon to the payee.

4. AGENCY. — In the absence of evidence of express appointment, of ratification, or of an estoppel, there is no sufficient evidence of agency.

5. CORPORATIONS — STOCKHOLDERS — NEGOTIABLE INSTRUMENTS. — A stockholder who sells his stock to one who offers him, in part payment, the negotiable securities given by him to the corporation for the stock, is not bound to inquire as to how these securities were obtained.

6. —— NOTICE. — A stockholder who sells his stock is not, by reason of entries on the books of the corporation, which do not evidence fraud, affected with notice of a fraudulent conspiracy between the directors and the purchaser to wreck the corporation.

Digitized by Google

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

W. L. SCOTT and E. MCGINNIS, for the appellant: Stock notes of insurance companies are not negotiable.—*Stillwell* v. *Craig*, 58 Mo. 24; *Schultz* v. *Sutter*, 3 Mo. App. 137; 1 Wag. Stats., p. 744, sects. 19, 20. And the indorsement of them by the corporation would be a nullity.—*Strauss* v. *Eagle Ins. Co.*, 5 Ohio St. 65; Story on Bills, sect. 79; *Floyd's Acceptances*, 7 Wall. 666. If such stock notes are negotiable, they are so only under statutory limitations.—1 Wag. Stats. p. 744, sects. 19, 20; *Attorney-General* v. *Life and Fire Ins. Co.*, 9 Paige, 474; *Smith* v. *Ale. Life Ins. Co.*, 4 Ala. 558; *New York Fire Ins. Co.* v. *Ely*, 2 Cow. 572; *Strauss* v. *Eagle Ins. Co.*, 5 Ohio St. 65. A stockholder stands affected with notice of the proceedings of the board of directors of his company as they appear in the public records of the company.—*Bedford R. Co.* v. *Bowser*, 48 Pa. St. 29; *Kitchen* v. *St. L., K. & N. R. Co.*, 69 Mo. 226, 265; Whart. on Ev., sects. 661, 662, 1131. Payment of negotiable paper before maturity is out of the due course of business, and the payer is not protected by such payment to one who has wrongfully acquired the paper.—2 Ames on Bills and Notes, 823; Pars. on Notes and Bills, 212, 213; Chitty on Bills (11th ed.), 394 *a;* Story on Bills (7th ed.), sects. 417, 384, 386; *Morley* v. *Culverwell*, 7 Mees. & W. 174; *Kingman* v. *Partee*, 17 Mass. 274; *Eckert* v. *Conmure*, 43 Pa. St. 120; *Griswold* v. *Davis*, 31 Vt. 390; *Goden* v. *Bank, etc.*, 6 Duer, 82.

J. B. HEISKELL, for the appellant.

OVERALL & JUDSON, for the respondent: "Stock notes" are negotiable in the hands of the corporation payee.—*Protection Ins. Co.* v. *Bibb*, 31 Conn. 534; *Ogdensburg R. Co.* v. *Wooley*, 3 Abb. Dec. 398; *Magee* v. *Badger*, 30 Barb. 246; *Clark* v. *Litcomb*, 42 Barb. 122; *White* v. *Haight*, 16 N. Y. 310. "Unless expressly restrained by

Digitized by Google

law a corporation may deal with its property in the same manner as an individual in prosecuting its legitimate business." — Morawetz on Priv. Corp., sect. 164; *Spear* v. *Ladd*, 11 Mass. 95. In the total absence of proof of any wrongful combination between Rollins and Davis, or of any notice or ground of suspicion on part of Rollins, it is immaterial what was Davis' attitude to the company and it is unnecessary to discuss the several propositions of plaintiff with reference therto. — *Alexander* v. *Horner*, 9 Cent. L. J. 111.

BAKEWELL, J., delivered the opinion of the court.

This was a bill in equity against James S. Rollins, George J. Davis, and the superintendent of the insurance department of Missouri in charge of the assets of the Life Association of America, to avoid a transaction by which Rollins obtained possession of certain stock notes and bonds, part of the assets of the Columbia Life Insurance Company. Judgment is asked against Rollins for the amount of the notes, which were made by him, and that he be required to deliver up the bonds.

The petition alleges that Davis acquired these assets by fraud, and fraudulently transferred them to Rollins, in furtherance of a conspiracy between Davis, the Life Association, and A. M. Britton, of which Rollins had notice, to release the stockholders of the Columbia (once called the St. Louis Life Association), and to effect a merger of that company with the Life Association of America by means of a transfer of all the stock of the former to the latter company, which was then to reorganize, directors of the Life Association being first chosen directors of the Columbia for that purpose.

Before any answers were filed, plaintiff dismissed as to the Life Association. Davis filed a general denial. Rollins, after a general denial, sets up that he sold his stock to Davis in good faith, and received his stock notes in part

Digitized by Google

payment in good faith; that the St. Louis Life (afterwards Columbia), afterwards ratified this proceeding; that the receiver of the Columbia, with the full knowledge of all the facts, also ratified the transfer, and has placed it out of his power to rescind and place the parties in *statu quo;* that the stock of the Columbia was at par when Rollins sold, and is now worthless, etc.

On hearing, plaintiff's petition was dismissed. The matters in controversy have been repeatedly before this court in the progress of the complicated litigations growing out of these transactions. Especially the matters in evidence in this case were before this court in *Alexander* v. *Relfe* (9 Mo. App. 133), and in *Alexander* v. *Supe et al.* (11 Mo. App. 597). Besides a great deal of *viva voce* testimony, the whole record of this court and of the supreme court in *Alexander* v. *Relfe* (*supra*), was put in evidence on this trial. The testimony is, of course, very voluminous. The sum of it, so far as it is material for the purpose of this appeal, is as follows:—

The St. Louis Life Insurance Company was first called the Mound City Mutual Life Insurance Company; it changed its name repeatedly. Its last name was the Columbia, and by that name, to avoid confusion, it will be called in this opinion.

It appears that defendant, Rollins, whose residence was throughout at Columbia, Missouri, subscribed, in December, 1873, for one hundred shares of the capital stock of the Columbia, of the par of $100. At the same time, Rollins borrowed of the Columbia $10,000, for which he delivered his two notes, one for $1,500 at one year, and the other for $8,500 at three years, and delivered as collateral, eleven Missouri State bonds of $1,000 each. Rollins paid for his stock with the money thus borrowed. The notes remained in the possession of the Columbia until December 10, 1875, and were unpaid, except as to $1,000 credited in April, 1875, on the $1,500 note.

Digitized by Google

On November 23, 1875, the Life Association of America entered into an agreement with defendant Davis to purchase from him nine thousand four hundred shares of the capital stock of the Columbia, and as many more shares as Davis could deliver within thirty days. With the stock, Davis was to deliver stocks and securities owned by the Columbia, of which a list was attached to the contract. For the nine thousand four hundred shares and the securities, Davis was to receive $1,215,000, and for all other shares, he was to receive par. Ninety per cent of this was to be paid to Davis by a draft of Hough, its president, on the Life Association, accepted by it at one day's sight. The remainder was to be paid cash, on delivery of the stock and securities. This agreement was made in pursuance of a resolution of the directors of the Life Association, of date November 13, 1875. The assets to be transferred were largely stock notes and capital investment notes secured, as the insurance law required, by collaterals and real estate. The Rollins notes were amongst them. Davis, Britton, and Lomax were then directors of the Columbia; Lomax was its secretary; Britton was its vice-president, acting as president; Davis was the regular salaried attorney of the Columbia. The company had a lien on the stock for any indebtedness due it by the stockholders. Davis was to deliver the stock free from lien. Davis tendered his resignation as director on November 26th. It was accepted four days afterwards. Lomax and Britton retained their positions until the transactions were accomplished. Having made the above contract with the Life Association and resigned as director of the Columbia, Davis made a proposition to the Columbia to buy of it the property mentioned in his contract with the Life Association, at the price he had proposed. The minutes of the board of directors of the Columbia, show these proceedings on November 30, 1875.

Mr. Davis then submitted a list of securities belonging to

Digitized by Google

the company which he desired to purchase, the price being satisfactory, and for payment of which he would give the draft of H. W. Hough, president, on the Life Association to the order of Davis at one day's sight and accepted by said Life Association. After an examination of the list and full discussion thereof, the following resolution, offered by Mr. Bogy, was adopted: —

"*Resolved*, That the vice-president be authorized to sell and deliver to George J. Davis the following securities, or any one or all of said securities, at the price named in the list hereto appended, and that the vice-president be authorized to receive in payment for said securities, so sold and delivered, the draft of W. H. Hough, president, drawn at one day's sight to the order of George J. Davis and by him indorsed to the Life Association of America and by said Association accepted."

The list of securities mentioned in the contract, with prices aggregating $1,111,898.34, follows. The notes of Rollins are included, and they were afterwards duly indorsed by the Columbia and delivered to Davis. Davis complied with his contract, and received in payment, on December 10, 1875, from Britton, as acting president of the Columbia, the draft of the Life Association for $1,111,-898.34 to Davis' order. This draft Davis indorsed without recourse and delivered to the Columbia on December 10th, on which day the minutes of that company show that the president informed the board that Davis had tendered to him the draft as specified in the resolutions on the 30th, and that, in accordance with those resolutions, he had sold and delivered the securities. The directory of the Columbia then resigned, and the Life Association, holding all its stock, elected a directory composed of persons who had been directors of the Columbia. Besides the Rollins notes, there were, amongst the assets transferred, notes of the firm of which Davis was a member, of Lomax, and of Britton. These persons all got back their notes from Davis

Digitized by Google

in exchange for their stock, as did the other stockholders of the Columbia. As soon as Davis had possession of the assets of the Columbia, he set to work to buy its stock, returning to the stockholders the notes and collaterals they had given for the stock and any percentage they had paid in cash. Then Rollins received from Davis his notes and collaterals and $1,000 cash in exchange for his stock. As Davis was in St. Louis, and Rollins in Columbia, the negotiations were by letters. The letters were not produced, no copies having been kept. The result was as stated. The stock was worth, at the time, on the market fully what was paid for it. The Columbia stood high in public estimation. There is no evidence that the Life Association of America was not quite solvent when it gave its draft to Davis, or that they could not pay the draft. But, shortly afterwards, the Columbia, by a two-thirds vote of its directory, was authorized to reduce its capital stock from ten thousand shares of the par value of $100 to any amount not less than $100,000. The directory then resolved on a reduction of nine thousand shares; to effect which, they set aside $900,000 alleged surplus, and bought that number of shares at par from the Life Association, for which they paid by canceling that amount of the Davis draft. The remainder was paid in cash or its equivalent. The Life Association continued to be a live concern long after this. The Columbia was reputed solvent and doing a profitable business in December, 1875. Its character was injured by subsequent litigation. It was dissolved by decree of court in October, 1878. Afterwards, plaintiff, as receiver of the Columbia, sued the Life Association for non-payment of the Davis draft, and got judgment for the amount unpaid, on which judgment he has collected something near $100,000. The Columbia in liquidation can not pay twenty-five cents on the dollar out of the assets so far collected. A large proportion of the claims against her are for liabilities existing on December 10, 1875.

Digitized by Google

The evidence that immediately after the delivery of the draft on December 10th, the Life Association controlled the Columbia, was rejected by the trial court, as were also offers of testimony to the effect that Davis was worth only $5,000 when he indorsed the draft; that in many cases drafts drawn by him to the order of stockholders for their stock were delivered by him to Britton as agent of these stockholders, and that Britton, Lomax, Davis, and the Life Association managed that the draft was not to be paid, or protested.

In the record in the case of *Alexander* v. *Relfe* introduced in this case, there was evidence tending to show that the whole transaction between the two companies was in good faith and believed to be for the benefit of the Columbia; there was also evidence tending to show that it was a fraudulent plot on the part of Davis, Lomax, Britton, and others to appropriate and waste the assets of the Columbia. The circuit court, in the case just cited, found that the facts in evidence showed no fraudulent intent on the part of these men or the directory. The supreme court found that the transaction was a constructive fraud, at least, and that the acts of the two corporations which resulted in the cancellation and retirement of the capital stock, were unlawful. *Alexander* v. *Relfe*, 74 Mo. 495.

There is no evidence tending to show that defendant Rollins knew or suspected any fraud. There is nothing in the testimony, so far as we can see, that tends to throw any discredit upon the following very explicit declaration in his testimony in this case: —

"If any conspiracy or confederacy, as charged in the petition, existed between the St. Louis Life Association, George J. Davis, and A. M. Britton, or either of them, or any other parties, I never heard of it, suspected it, or knew anything about it. When I received my notes and bonds from George J. Davis in exchange for my stock, I supposed he had become the true and lawful owner, and as such that

Digitized by Google

he had the legal right to sell the same, and I did not know nor have any reasons to believe, that Mr. Davis had become the owner of my notes for any improper motives, or in any improper or illegal manner, or with any intent to wrong or injure the St. Louis Life Insurance Company, or its creditors, or stockholders, or that the company had thereby become weakened in any way, or the stockholders or creditors thereof become any less secure."

As to actual notice of any fraud, it is clear that defendant Rollins had none.

The attempt is, to hold Rollins on account of notice to Britton, who it is said, was the agent of Rollins in the matter of the sale of stock, and of the position of Rollins as a stockholder of the Columbia.

1. As to the first, we see no evidence to warrant a finding that Britton was the agent of Rollins in any such sense as to affect Rollins with notice of what Britton knew.

Rollins had known Britton slightly for many years; but he had no intimate acquaintance with him. Rollins positively swears that, to his knowledge, Britton never was his agent, for any purpose whatever; that he never, in any way, authorized Britton to act for him in the matter in controversy, and never saw, spoke, or wrote to Britton about the matter; that it may be possible that Britton forwarded to him the notes and collateral; but that, if this be so, he does not recollect it.

Plaintiff introduced a memorandum of the transaction between Davis and Rollins, which does not appear to have been made by Rollins, as follows:—

"James S. Rollins		100 shares.
Cash		$10,450
Paid by collateral 23		500
	$8,500	
Interest.	540	
Cash	1,000"	

"A. M. B."

Digitized by Google

On the back of this is written, "Received from Geo. J. Davis the within, in full settlement of one hundred shares of St. Louis Life stock sold him December 10, 1875. A. M. Britton."

This is dated the day of the check. It was shown that Davis wrote to Rollins at Columbia to send the stock to him, or to some person in St. Louis, for Rollins. This is all the testimony as to that matter; and it is not enough, we think, to affect Rollins with notice of what Britton knew about the transaction.

2. Appellant contends that the stock notes of Rollins were non-negotiable; that Davis was not an innocent purchaser for value, and that Rollins was bound to inquire how Davis got possession of his stock notes. The notes of Rollins were negotiable in form. It was held by the circuit court of the United States for the eastern district of Arkansas, in a similar case arising out of the very same transaction here in litigation (*Alexander* v. *Homer*, 11 C. L. J. 111), that insurance companies have the power to take and hold negotiable paper and other securities in the general conduct of their business, and that this includes the power to negotiate them; and that, even if Davis obtained the note of a stockholder by fraud, as stock notes, such as the one in suit are negotiable, the maker is discharged from liability to the payee if he paid the note to the fraudulent holder without notice of the fraud; and that the discharge extends to the original consideration. Appellant contends, however, that that decision ought not be regarded as in point, for the reason that it does not appear that Judge Caldwell, by whom it was delivered, had before him the Missouri statute. The statute in question (Wag. Stats., p. 744, sects. 19, 20), so far as we can see, says nothing which directly or indirectly, tends to impair the negotiability of a note given for stock in a mutual company. On the contrary the power to accept such paper involves the power to utilize it. We think with the learned judge of the circuit

Digitized by Google

court who tried this cause, and with the learned judge who delivered the decision of the Federal court in the similar case just cited, that there was nothing in the fact that the note was given for his stock, to put Rollins upon any particular inquiry about the matter, or to affect him with notice that Davis acquired the note by breach of trust. In *Stillwell* v. *Craig* (58 Mo. 24), there is a *quære* as to whether a corporation can make a valid transfer of a promissory note expressed to be for ten shares of its capital stock payable in installments not to exceed ten per cent on each share, at thirty days' notice of call, when such a note is held as part of a trust fund representing the capital stock of the corporation. But the question was not before the court, and is not answered. The case is no authority for the view of appellant. Nor do we see why it must be held, that because the assets of a corporation are a trust fund for its creditors, the corporation, when solvent, can not through its directory and proper agents, use and transfer its assets. We think that it may do so, and must have such power, unless it is to be injuriously hampered. Except so far as restrained by statute, a corporation, generally speaking, may deal with its property as an individual may.

A balance on the smaller note was, however, overdue. But, as between Davis and the corporation, the title of Davis was perfect. This might have enabled the corporation to recover on the note from Rollins, if Davis had stolen the note and had been paid by Rollins as legal holder for value, when he was not so. It is creditors of the corporation, through its receiver, who claim that Rollins knew that this asset of the corporation was transfered to Davis in fraud of their rights; and, to recover a second time from Rollins, they must show that such was the nature of the transaction between Davis and the corporation, and that Rollins knew it, or was bound to know it, and would have known it if he had done his duty.

What duty had Rollins in the premises? He held stock

which he could have sold in the stock market for par. He sells it to a former director, who offers him for it its market value, part in cash, part in negotiable notes which Rollins had given with collateral bonds to the company in part payment when he bought the stock. It is not pretended that Rollins, in Columbia, had any actual notice of what the directors of the mutual company of which he was a member were doing in St. Louis. But let it be conceded that he had constructive notice of the proceedings of the board, so far as they are matters of record, we do not see that that would entitle plaintiff to recover. The record could disclose nothing to him as to the fraudulent intent that the draft should not be paid, that the Columbia was to be rendered insolvent, that its stock would be fraudulently retired. The Life Association had power to buy, and the Columbia had power to sell. On its face the transaction was honest enough; it was perhaps a cover for an ingenious plot by which the conspirators were to be enriched at the cost of the unhappy persons for whom they were trustees; but these conspirators, on any theory, covered themselves with a mask of honesty, and the stockholders are not supposed to have seen behind the mask. This mask was the very record entries which are now invoked as giving notice of the fraud to every stockholder dealing with Davis. But we can not see that any records to which the stockholders had access gave any such notice.

We can not hold, either, that an insurance corporation, as such, can not dispose of its negotiable assets, or that the stockholder of such a company, if he sells his stock for its fair price, to one who offers him in part payment of it the negotiable securities which the stockholder had formerly given to the company, is bound to inquire how and where the purchaser obtained those securities, or is affected with notice of a secret conspiracy between this purchaser and the directory to wreck the company for their benefit.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

Digitized by Google

F. W. HEMAN, RECEIVER, Appellant, v. JAMES H. BRITTON ET AL., Respondents.

May 12, 1883.

1. EQUITY PRACTICE — REFEREES. — A referee's findings of fact in an equity proceeding is not conclusive upon the trial, or the appellate, court.
2. CORPORATIONS — DISTRIBUTION OF ASSETS. — After providing for the payment of its debts a corporation may distribute its assets among its shareholders.
3. —— RECEIVERS — EQUITY. — Assets distributed to shareholders, subject to a pledge to secure creditors, belong, in equity, after the debts for which the pledge is made are paid, not to the receiver of the corporation, but to the shareholders.
4. —— The debts of the corporation being paid, assets distributed among the shareholders subject to a pledge for the payment of the debts, can not be subjected to the payment of the costs of the receiver's administration.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

B. H. DYE and DRYDEN & DRYDEN, for the appellant: The assets of a corporation are a trust fund for creditors, and can not be distributed until after all debts are paid.— *Wood* v. *Drummer*, 3 Mason, 308; Thompson on Stock., sect. 10; *Gill* v. *Balis*, 72 Mo. 424; *Sawyer* v. *Hoag*, 17 Wall. 610; *Upton* v. *Trebilcock*, 1 Otto, 45. The findings of a referee in an equity proceeding are not binding upon the courts. — *O'Neill* v. *Capelle*, 62 Mo. 208; *Moniteau Nat. Bank* v. *Miller*, 73 Mo. 192.

OVERALL & JUDSON, for the respondents: A corporation may distribute its assets among its stockholders after providing for the payment of its debts. — Morawitz on Priv. Corp., sect. 573.

BAKEWELL, J., delivered the opinion of the court.

The petition alleges that defendants, by a vote of the directors of the De Soto Insurance Company, of which plaintiff

Digitized by Google

is receiver, received eleven Missouri state bonds of $1,000 each, assets of the company, which they received and hold in trust for and to the use of the company; that the company is insolvent; that the bonds are needed to satisfy its liabilities; that the defendants knew all this when they received the bonds. The prayer is for an account and a return of the bonds to plaintiff as receiver. The answer was a general denial. The cause was referred by consent.

The referee made a special finding of facts, and reported that plaintiff ought to recover ten bonds and $1,411.05 and interest; and in case defendants do not deliver up the bonds, then the judgment should be $10,000. The trial court sustained exceptions to the report, and, taking the report as a special verdict, found for defendants.

As the proceeding is in equity, and all the testimony is brought up, the question for our consideration is not whether, upon the facts as found by the referee, the court erred in finding for the defendants. The findings of fact by the referee are not conclusive upon the trial court, or upon this court, in a proceeding in equity, though they may have weight. If upon the facts in evidence the plaintiff was not entitled to a decree, we have nothing to do but to affirm the judgment.

There can be no controversy, however, about the material facts, which are as follows: The De Soto was a mutual life insurance company, organized in 1869 by a small body of well known business men in St. Louis. At the time of the occurrences hereafter detailed, the shares of stock were twelve hundred and ninety in number, divided in the following proportions among the following shareholders: William Ballentine, 378; John Jackson, 120; Wm. E. Burr, 75; A. Johnson, 50; Thomas E. Tutt, 50; John R. Lionberger, 196; James H. Britton, 196; James H. Lucas, 100; H. S. Turner, 50; Wm. J. Lewis, 50; H. Christopher, 25 shares. In 1871, the company was found not to prosper, and it ceased to do business, and reinsured its risks in a Chicago

Digitized by Google

company. The Chicago company failed in 1874, and the De Soto reinsured its risks in the Mound City, afterwards known as the St. Louis Life, and still later as the Columbia Life Insurance Company of St. Louis. At the time of this contract with the Mound City, the De Soto liabilities were small, consisting mainly of fifty-four policies valued at $20,019.50, which the Chicago company had not been able to get in for cancellation. Its assets consisted mainly of the securities valued at $100,000.00, which by law the De Soto had on deposit with the superintendent of insurance, of which the bonds received by defendants were a part.

The contract of the De Soto with the Mound City was duly executed by both companies, on the 12th of February, 1874. By its terms the Mound City agreed to assume and pay, and hold the De Soto harmless from the fifty-four policies spoken of above, and all other debts and liabilities, and, by the substitution of other securities, to cause to be released the $100,000 of securities of the De Soto on deposit with the insurance department; and, immediately after the execution of the agreement, to assign and deliver these securities, when released, to Lionberger, Ballentine, and Britton (defendants herein), in trust for the then individual stockholders of the De Soto; also to assign and deliver to the same trustees, upon the same trust, all other effects of the De Soto thereinafter assigned to the Mound City. The De Soto, on its part, agreed to pay to the Mound City, upon the delivery of the assets and securities to the three trustees above named, $20,019.55. It assigned and transferred to the Mound City all its assets, except the $100,000 of securities in the insurance department. It agreed to give the Mound City a bond for $10,000, executed by Ballentine, Lionberger, Jackson, Tutt, Burr, and Britton (the six defendants herein), conditioned to indemnify the Mound City from all demands against the De Soto presented within five years, except upon the fifty-four poli-

Digitized by Google

cies. It agreed, that after the delivery of assets and securities, the De Soto would secure a transfer of its capital stock to such persons as the Mound City should name, on the understanding that such transferees were not to participate as beneficiaries in the division of the securities and assets to be delivered to the three trustees, which was to be for the benefit only of those who owned the De Soto stock at the time of its transfer to the Mound City.

On February 12, 1874, the date of this contract, at the same board meeting at which it was authorized, before any thing had been done under it, eight of the eleven stockholders, representing together one thousand and ninety shares of stock, being present at the time, the board of directors of the De Soto passed the following resolutions: —

"On motion of Mr. Lionberger, duly seconded and carried, John R. Lionberger, James H. Britton, and William Ballentine were appointed trustees to carry out the provisions of the contract executed with the Mound City Life Insurance Company, and were authorized to receive and distribute the securities and assets of this company, and to distribute the same among the present individual stockholders of the company as their interests therein may be shown by certificates of stock."

"*Resolved*, That, whereas James H. Britton, William Ballentine, John R. Lionberger, John Jackson, Thomas E. Tutt, and William E. Burr, have executed a bond for $10,000, as is provided for in the agreement this day entered into between this company and the Mound City Mutual Life Insurance Company, of this city, now, then, to secure the said signers of said bond, and to save them from loss and damage, it is hereby ordered that eleven bonds of $1,000 each, now the assets of the company, issued by the state of Missouri, be deposited with the Safe Deposit Company, of this city, subject to their order, or order of their legal representatives, and full power is hereby given them to sell any or all of said bonds at any time, and with the proceeds

Digitized by Google

thereof pay any lawful demands that may be made upon them under said bond."

All the defendants were directors of the De Soto, and took part in this directors' meeting of February 12, 1874. Two days after this meeting the president and secretary of the De Soto withdrew the $100,000 of securities from the custody of the insurance department, and the Mound City substituted other securities, as agreed. This was the last meeting of the De Soto directory. Nothing took place at it which has any bearing upon the issues in this case. The eleven bonds were then received by respondents; and, on the 28th, they executed the bond of indemnity, according to the agreement with the Mound City. Meanwhile the $100,000 of securities had been distributed ratably among the stockholders. These eleven bonds must, of course, be excepted from the last statement. They were incapable of distribution, from their amounts. But, as to them, the six trustees, defendants here, executed certificates of which one was delivered to each stockholder. These certificates were in the following form, *mutatis mutandis*, as to names and amounts: —

"WHEREAS, we, the trustees appointed by the board of directors of the De Soto Mutual Life Insurance Company, at a meeting held February 12, 1874, hold eleven bonds of the state of Missouri of $1,000 each, bearing interest at six per cent per annum; and whereas, said bonds are held by us to indemnify Wm. Ballentine, James H. Britton, John R. Lionberger, John Jackson, Wm. E. Burr, and Thomas E. Tutt against any loss by claims or otherwise that may accrue against them by reason of a certain bond of indemnity executed by them to the Mound City Life Insurance Company, dated February 28, 1874; and whereas, it is understood that all claims accruing under said bonds of indemnity shall first be paid out of said bonds, also such expenses as may accrue for safe keeping of the same; then the remainder, when released by expiration of said bond of indemnity, five years from February 12, 1874, shall be divided among the fol-

Digitized by Google

lowing named persons in the proportion indicated by the fractions set opposite their names:" (Then follow the names of the eleven stockholders and their interests in the stock, beginning "Wm. Ballentine, $\frac{878}{1290}$,") etc. "Now this certifies that John R. Lionberger is entitled to receive upon the return of this certificate, properly indorsed $\frac{196}{1290}$ of the proceeds of said bonds, when divided as above."

Defendants collected the interest; and, out of that and the sale of one bond, paid some claims against the De Soto. When the original bonds matured, they invested the proceeds in ten similar bonds; and at the expiration of their liability under the terms of the bond, they had on hand ten bonds and $1,411 cash proceeds. The five years' limit of liability under the bond expired on the 28th of February, 1879. This suit was begun in November, 1879. All claims presented against the Mound City, *alias* Columbia, in the five years, had been paid, and there were none outstanding. The referee found that the liabilities of the De Soto were fully secured from the assets pledged to the Mound City. Of that there can be no doubt. The Mound City failed; and in the course of the proceedings to wind her up, the superintendent of insurance delivered to plaintiff ten part due notes of $10,000 each, secured by mortgage. Plaintiff's share of the proceeds of the mortgaged property will be something like $70,000. When the De Soto was proceeded against by the insurance department, its insurance reserve was less than $4,000. This was afterwards increased to $5,569. There is no other liability of the De Soto except the expenses of administration, say $6,000. It is within bounds to say that the assets of the estate of the De Soto are more than four times her present and prospective liabilities.

Some of the certificates set out above have been negotiated. They are all outstanding.

Pending his intervening petition against the receiver of the Columbia to recover his share of the insurance deposit

Digitized by Google

and pending this suit, plaintiff, by leave of court, borrowed of James Baker $5,000, for expenses of administration; of this sum $2,666 and interest remains unpaid.

There can be no doubt that a corporation, after making provision to pay its debts, may distribute its assets among its stockholders. This corporation made ample provision for the payment of its debts. The question is, were these bonds distributed to the stockholders by the corporation, or were they, in the general distribution of the other assets, retained by the corporation, when pledged to the six directors who gave the indemnifying bond?

As to this, the referee found that, "notwithstanding the provision for the distribution of assets, and notwithstanding also that the contract with the Mound City appointed the same three to take the whole deposit when released, and hold the same for the then stockholders of the De Soto, the board of directors subsequently, at the same meeting, on February 12, 1874, withdrew from the assets of the company the eleven bonds in question, and pledged them to secure the signers of the indemnity bond, which act was an appropriation of the bonds inconsistent with the distribution of them by those three trustees, and which, in my opinion, left the bonds vested in the company subject to the trust, or pledge, to the bondsmen."

In effect, the stockholders as individuals could not distribute the assets of the company. These belonged to the corporation, and could only be distributed amongst the stockholders according to their interests, by the corporation, acting in its corporate capacity through its proper officers. Nor does it appear how the corporation could pledge what it had already distributed. There seems to have been an intention of distributing the whole $100,000 of assets. But, in the very act of making this distribution, a definite portion of these assets, to wit, these bonds, were withheld from distribution; and, whilst three trustees were named to receive and distribute the assets in accordance with the

Digitized by Google

terms of the contract with the Mound City, it was ordered that, of these assets, the eleven bonds spoken of in the resolutions as being yet assets of the corporation, should not be distributed, but deposited to the order of the six persons who had become liable for the corporation, and in trust, to sell them, if necessary, and pay demands against the company with the proceeds.

The subsequent act of issuing a certificate to each stockholder, setting forth his interest in these bonds, was the act of the stockholders to whom the bonds had been delivered as security for any risks they took by becoming bound for the company; and neither that, nor anything subsequent to that, can change the nature of the act done by the corporation on the 12th of February.

But the nature of that act is plain enough, if we are to have any regard to the intention of the corporation, as manifested by its contract with the Mound City and the resolutions of the board of directors, and the whole transaction viewed together. It was simply to distribute amongst the stockholders the assets received from the Mound City. In order to effect this without injustice, a provision was made to meet any small outstanding claims. As six stockholders had become bound to indemnify the Mound City against such claims, they were in turn to be indemnified; and, for this purpose, these eleven bonds were subjected to their contract, but undoubtedly with the intention, that when such claims had been discharged, the remaining proceeds of the bonds should belong to the stockholders. These bonds, under the resolution of the board, belonged to the stockholders from its date, according to their respective interests in the stock of the company, and were pledged by the corporation, with the assent of the stockholders, as property in the hands of the corporation, in which each stockholder had the interest represented by his stock, the proceeds, after satisfying the claims for which they were pledged, to be delivered by the trustees to the stockholders

Digitized by Google

pro rata. There can be no doubt as to the intention of the parties interested; and it does not appear how the matter can concern the creditors of the corporation represented by the receiver. We do not see that this pledge of these bonds was an act necessarily inconsistent with the distribution by the trustees, or that it left these bonds vested in the corporation contrary to the clear intention of the stockholders, the board of directors, and everybody concerned. That they are spoken of in the resolution as "assets of the corporation," is immaterial. The expression is not inapt under the circumstances. They were assets of the corporation at the inception of the act, in the carrying out of which they ceased to be so. The corporation rid itself of all its assets, having first secured its creditors.

There seems to be no reason why the stockholders of the De Soto should be interfered with, since the corporation was abundantly solvent, in an attempt quietly and honestly to wind up what was really their own affair, without the accruing of large costs for no purpose beneficial to the stockholders, the creditors of the corporation, or the general public.

That there was no actual distribution of these eleven bonds when the other assets were distributed, and that this pledge of the bonds was inconsistent with such a distribution, does not seem to us to be decisive of the question. Equity looks through forms to substance. It is manifest that the substance of this transaction was, that the corporation divested itself of its assets for the purpose of distributing them amongst the individual stockholders composing the corporation so fully as this could be done consistently with pledging these eleven bonds to secure certain stockholders who had become bound for the corporation to enable it to carry out its desire of completely divesting itself of all its assets and vesting them in the stockholders, according to their respective proportions of stock. These pledgees then held the stock in trust for certain purposes named, and

when those purposes were fulfilled, and the liability for which the bonds were pledged was at an end, then, in trust for whom? For the corporation that pledged the bonds? Clearly not, since the pledge was made to facilitate a complete distribution amongst the stockholders of all the assets of which these bonds were a part. The bonds were distributed, so far as this was consistent with their being pledged. When the liability of the pledgees for the debts of the corporation was at end, then the bonds, or whatever might replace them, or their proceeds, were to be actually distributed, the corporation having clearly manifested its intention whilst delivering these bonds to the pledgees, that, subject to the pledge, the bonds should belong to the stockholders.

We think that the judgment of the circuit court should be affirmed. It is so ordered. All the judges concur.

Henry Meyer, Defendant in Error, v. William Hartman, Plaintiff in Error.

June 12, 1883.

1. Void Judgments — Collateral Attack. — Advantage may be taken of a void judgment in a collateral proceeding, even though jurisdiction of the person appears affirmatively from the record.
2. —— Jurisdiction — Notice. — Where the statute provides that jurisdiction of the circuit court shall not attach, except upon notice to the adverse party, after a reversal of the judgment on appeal, if such notice is not given, further proceedings in the circuit court are void.
3. —— Foreign Judgments. — A foreign judgment rendered after a reversal and without such notice can not be made the foundation of an action in this state.

Appeal from the St. Louis Circuit Court, Thayer, J.
Reversed and remanded.

Digitized by Google

LOUIS GOTTSCHALK, for the plaintiff in error: Want of service of notice, or that appearance by attorney was unauthorized, may be shown to impeach a foreign as well as domestic judgment. — *Marx* v. *Fore*, 57 Mo. 69. And this can be done, even though the jurisdiction of the court over the person appeared affirmatively from the record.— *Eagler* v. *Stover*, 59 Mo. 87; *Corbey* v. *Wright*, 4 Mo. App. 443; *Napton* v. *Leaton*, 71 Mo. 358.

W. C. JONES, for the defendant in error: The appeal or writ of error must be regarded not as a new suit, but rather as the continuation of an old one. Freem. on Judg., sect. 569. "When the court has jurisdiction of the cause, and of the parties, and only proceeds erroneously, the judgment, notwithstanding such error, is binding until it is vacated or reversed." — *Smith* v. *Knowlton*, 11 N. H. 191.

THOMPSON, J., delivered the opinion of the court.

This was an action upon a judgment rendered in favor of the plaintiff and against the defendant in 1876, in the circuit court of Randolph County, Illinois. The answer admits the rendition of the judgment, but denies that the defendant appeared in his own proper person or by attorney. On the contrary, it alleges that the suit was begun in that court in 1874; that such proceedings were had, that at a trial in 1874, at which the defendant appeared, a judgment was rendered in his favor; that afterwards the plaintiff appealed to the supreme court of Illinois, and that, in 1876, the judgment was reversed and the cause remanded. The answer then states that it is provided by section 84, of chapter 110, of the Revised Statutes of Illinois of 1874, that when a cause or proceeding is remanded by the supreme court, upon the transcript of the order of the supreme court remanding the same being filed in the court from which the cause or proceeding was remanded, and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated

Digitized by Google

therein; and that in case of non-resident parties, or parties who can not be found so that personal notice can not be served upon them, the notice may be given as in cases in chancery, or as may be directed by the court; and, that it is further provided by the laws of Illinois that in case of non-residents of the state, in chancery proceedings, notice of the commencement or pendency of suit shall be given by publication in some newspaper. The answer then alleges that the defendant is, and, ever since the year 1874, has been a resident and citizen of the state of Missouri, and that no notice whatever was given to him of the filing of the transcript of the supreme court in the office of the clerk of the circuit court of Randolph County, or of any of the facts required by law; that neither he nor his attorneys received notice of any such facts, either personally or by publication, or otherwise; and that neither he nor they did, in fact, know of the filing of the said transcript, or of the redocketing of said cause, or of any application for that purpose. Wherefore the defendant says that the circuit court of Randolph County had no jurisdiction to render the judgment, and that it is void.

On motion of the plaintiff the circuit court rendered a judgment in his favor and against the defendant, notwithstanding the answer. And the propriety of this ruling is what we have to consider.

The following propositions of law must be regarded as settled in this State: that a judgment rendered without notice is void (*Anderson* v. *Brown*, 9 Mo. 646; *Roach* v. *Burnes*, 33 Mo. 319); that advantage may be taken of such a judgment in a collateral proceeding (*Abbott* v. *Sheppard*, 44 Mo. 273; *Higgins* v. *Peltzer*, 49 Mo. 152); that the fact that the judgment was rendered without notice, or upon an appearance of an attorney which was not authorized, may be shown to impeach a foreign as well as a domestic judgment (*Marx* v. *Fore*, 51 Mo. 69), and that this can be done, even though the jurisdiction of the court over

Digitized by Google

the person appears affirmatively by its record. *Eager* v. *Stover*, 59 Mo. 87; *Napton* v. *Leaton*, 71 Mo. 358, 367.

So far as we can ascertain, the Illinois statute which is set out in the answer, is a recent one. It does not appear to have been construed by the supreme court of that state. Prior to its passage it had been held in that state, that when a cause is remanded from the supreme to the circuit court, it may be redocketed in the circuit court and there proceeded with, without giving any notice to the opposite party. *Murray* v. *Whittaker*, 17 Ill. 230; *Renugh* v. *McConnell*, 36 Ill. 375. The statute was probably passed to remedy the evils which were found to flow from this rule. But whether it is to be so construed as to mean that the giving or publishing of notice, according to its terms, before the reinstating, in the circuit court, of a cause which has been remanded from the supreme court, is a step necessary to reinvest the circuit court with *jurisdiction* to proceed, so that, if the step is not taken, the subsequent proceedings will be void, or whether it is such a step, that the failure to take it will be merely an error or irregularity, which can only be taken advantage of in a direct proceeding to vacate the judgment, is a very important and difficult question. In our former opinion we did not feel called upon to decide this question, as, in the view we then entertained, it was not clearly raised in the pleadings. After a motion for a rehearing and a further consideration, we came to the conclusion that we were mistaken in our construction of the pleadings, and that it was our duty to decide the question on its merits.

Counsel have not cited in their brief, nor, in the limited time at our disposal, have we been able to find, any decision upon a question strictly analogous to this. The case of *Cone* v. *Hooper* (18 Minn. 531), which is cited and relied on by respondent, is not in point. That case was, like this, a suit on a foreign judgment, and the contention was that the judgment was void for want of notice of an appeal which had been taken from a prior judgment in the same

Digitized by Google

case in favor of the defendant, which appeal had resulted in the reversal of such prior judgment, and in remanding the cause to the court below for further proceedings, upon which further proceedings the plaintiff had recovered against the defendant the judgment sued on. But, as the record showed that the defendant appeared in the appellate court by counsel at the hearing of the appeal, and argued the appeal on its merits, it was justly held that there was nothing in the point that he had not been served with notice of the appeal; since his voluntary appearance, for all the purposes of the appeal, cured the defect of want of such service.

It has been held in other courts, generally, we believe, on motions to dismiss appeals, that where there is a statute which requires service of a written notice of the taking of an appeal, if no such notice has been served, or if it has not been properly served, the appellate court acquires no jurisdiction, unless there be a voluntary appearance for the general purposes of the appeal, and that, without such an appearance, the appeal may be dismissed on motion. See *Draper* v. *Taylor*, 47 Iowa, 407.

By the New York code of civil procedure, writs of error were abolished and appeals substituted therefor in all cases, and provision was made for serving written notice of appeal on the adverse party. The service of this notice has been regarded as a jurisdictional matter, which the party has the right to take advantage of at any time, provided he has not appeared and answered or proceeded in such a manner as to give the court jurisdiction over his person. *Tripp* v. *DeBow*, 5 How. Pr. 114.

The terms of the Illinois statute, as stated in the petition in this case, clearly import, that when the cause is removed from the circuit to the supreme court by appeal or writ of error, the jurisdiction of the circuit court therein is determined, and does not again attach until the cause shall have been remanded by the supreme court and "*reinstated*" in the circuit court after the giving of the notice therein specified. But for the existence

Digitized by Google

of this statute, we should apprehend that the party, being regularly before the supreme court, would be bound to take notice of the remanding of the cause, and would be bound to follow it to the circuit court, and to take notice of any further proceedings therein which might be had in that court, without the giving of any formal notice by the other party of his intention to take such proceedings. Such, at least, is our practice; and we do not know that it has ever been suggested here, that on the remanding of a cause from the supreme court, or from this court, to the circuit court, the respondent is entitled to notice of further proceedings in the circuit court. But the Illinois statute manifestly proceeds on a theory analogous to the practice in relation to the writ of error, which is deemed to be, not a continuation of the same cause, but in some sense at least, a new suit which can not be commenced effectively without a service of notice. That this is the view upon which the Illinois statute proceeds will perhaps be rendered more clear by reference to the section which follows: "If neither party shall file such transcript within two years from the time of the making of the final order of the supreme court reversing any judgment or proceeding, the cause shall be considered as abandoned, and no further action shall be had therein." The statute clearly contemplates that, after a remanding of the cause by the supreme court, the party who has been successful in the supreme court may, or may not, desire to proceed further in the circuit court; that if he shall elect to proceed further, he must file in the circuit court a transcript of the order of the supreme court remanding the cause, and give to the opposite party the notice already stated, or give notice by publication, or otherwise, by an order of the court as therein provided for; and that, until this is done, the jurisdiction of the circuit court to resume further proceedings in the cause does not attach. Its jurisdiction having determined by the rendition of its final judgment or decree, from which the appeal or writ of error was

Digitized by Google

prosecuted, that jurisdiction can only be revived in the mode which the legislature has prescribed. It seems that any subsequent proceedings taken by the circuit cour without the giving of such notice, actual or constructive, as the statute provides for, would be as clearly void as the action of the court would be, if, at a term succeeding that at which a judgment had been rendered, after the parties had gone hence, and without any notice to the party to be affected, it should set the judgment aside and render a new and a different judgment.

We hold, then, that upon the state of facts made by the *defendant's answer*, the judgment of the circuit court of Randolph County, Illinois, upon which this action is brought, was void, and that the court below erred in rendering judgment for the plaintiff upon the pleadings. The judgment is accordingly reversed, and the cause remanded. All the judges concur.

JAMES M. CLOUD, Respondent, *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

June 12, 1883.

1. RAILROADS — CONTRACT WITH PASSENGER. — The terms of a "round trip" ticket which provides that it must be stamped and the passenger's signature witnessed for identification by the connecting carrier before the passenger begins the return trip, are valid and binding.

2. —— DAMAGES. — The purchaser of such a ticket who has failed to comply with its terms can not, in the absence of evidence of a waiver or of want of opportunity to know its contents when he purchased it, have an action against the railroad because he was ejected from the car of a connecting road for failure to pay his fare.

3. —— AGENCY — WAIVER. — The contract having been made by the agent of a line of connecting roads, the waiver of its terms by one of the roads will not bind the others.

4. —— A railroad passenger conductor is not a general agent of the road authorized to waive the terms of a written contract of carriage.

Digitized by Google

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and remanded.*

BENNETT PIKE, for the appellant: The selling of the coupon ticket by the agent of the Mobile and Ohio Railway over its own line and that of defendant, and the other lines of railway to Niagara Falls and return, did not make the said railways joint contractors. — *Furstenheim* v. *Railroad Co.*, 9 Heisk. 852–858; *Hood* v. *Railroad Co.*, 22 Conn. 1; *Knight* v. *Railroad Co.*, 56 Me. 235. Even if it should be held that the contract implied from selling the coupon ticket to plaintiff by the agent at Mobile, of the Mobile and Ohio Railroad, is a joint contract of all the other carriers named in the coupons attached to the ticket, then the fact that the conductors of the other railway lines did not insist upon a compliance with the violated condition did not operate as an estoppel or waiver as against defendant demanding a forfeiture, on account of plaintiff's failure to perform the same. — *Sherman* v. *Railroad Co.*, 40 Iowa, 45; Thompson on Carriers, 337; 6 Am. & Eng. R. Cas. 333–339; *Jerome* v. *Smith*, 48 Vt. 230; *Downs* v. *Railway Co.*, 36 Conn. 287; *Chicago, etc., R. Co.* v. *Griffin*, 68 Ill. 499; *Pullman Palace Car Co.* v. *Reed*, 75 Ill. 125; *Shelton* v. *Railway Co.*, 29 Ohio St. 214; *Frederick* v. *Railroad Co.*, 37 Mich. 342; *Thompson* v. *Railroad Co.*, 56 N. Y. 295. The mere fact one conductor has wrongfully accepted a ticket, does not bind a subsequent conductor likewise to receive it. — *Townsend* v. *Railroad Co.*, 56 N. Y. 295; *Shelton* v. *Railroad Co.*, 29 Ohio St. 214. The receipt of an expired ticket by one conductor is not binding upon another conductor of the same line, so as to oblige him to receive it for passage. — *Hill* v. *Railroad Co.*, 63 N. Y. 101; *Johnson* v. *Railroad Co.*, 46 N. H. 213; *Stone* v. *Railway Co.*, 47 Iowa, 82; *Kelly* v. *Railroad Co.*, 67 Me. 173; *Wakefield* v. *Railroad Co.*, 117 Mass. 544; *Sherman* v. *Railroad Co.*, 40 Iowa, 45; *Dietrich* v. *Railroad Co.*, 71 Pa. St. 432.

Digitized by Google

LEROY B. VALLIANT, with whom is ROBERT CRAWFORD, for the respondent: An ordinary railroad ticket is a token and not a contract. — Thompson on Carriers, 423. The ticket in this case was one of those "artfully prepared" tickets, "contrived by scheming corporations and soulless companies, thrust upon the public without an opportunity of fair assent, in the press and hurry of railroad travel," condemned by our supreme court in *Levering* v. *Union Transportation Co.* (42 Mo. 88.) The terms of the limitations of the rights in the ticket must be plain and legible, and in such manner that it could not be overlooked. — Hutchinson on Carriers, sects. 245, 582. A condition on the ticket is not binding unless it is shown that the purchaser assented to it. — *Railway Co.* v. *Stevens*, 5 Otto, 655. This was but a regulation to insure that the same person, and none other, who purchased the ticket, used it. If we admit that it was a reasonable regulation, still it is not sufficient that it be reasonable in itself — it must be reasonably enforced. — Thompson on Carriers, 315. If no demand is made on him to comply with the regulation when in a position to do so, he does not forfeit his rights. — Hutchinson on Carriers, sect. 590; *Bass* v. *Railroad Co.*, 36 Wis. 450. When a forfeiture is claimed the language must be strictly construed. The language here is not that a failure to comply with either one of these conditions will work a forfeiture, but a failure to comply with all "conditions." — *Evans* v. *Railway Co.*, 11 Mo. App. 463.

THOMPSON, J., delivered the opinion of the court.

This is an action for damages alleged to have been sustained by the plaintiff in consequence of being expelled from one of the defendant's passenger trains upon which the plaintiff was traveling as a passenger. The plaintiff's case is this: He is a resident of Mobile, Alabama. On the 21st of June, 1880, he purchased of James W. Rooney, agent of the Mobile and

Digitized by Google

Ohio Railroad Company at Mobile, Alabama, what is known as a round trip coupon railway ticket, from Mobile to Niagara Falls and return, good until the 31st of October following. The connecting lines called for in this ticket were the Mobile and Ohio Railroad, the St. Louis, Iron Mountain and Southern Railway, the Chicago and Alton Railroad, the Michigan Central Railroad, and the Great Western Railway of Canada. This ticket embodied the terms of a special contract. It was dated in ink as of the date and place of its sale, and was signed in ink by James W. Rooney, as agent of the Mobile and Ohio Railroad Company, who sold it to the plaintiff, and by the plaintiff as purchaser. As thus dated and signed, it read upon its face as follows: —

"Mobile and Ohio Railroad.

"*Mobile — Ohio — To Niagara Falls and return.*"

"Summer Excursion Ticket. Good for one first class passage, when stamped by company's agent and presented with checks attached, subject to the following contract: —

"In consideration of the reduced rate at which this ticket is sold, I hereby agree to the following restrictions and conditions: That it is positively not transferable, and that I will use this ticket within fifteen (15) days from date of sale (as stamped on back and written below) going north, and within sixty (60) days from date of departure going south, and in no case later than October 31st, following date of sale. I further agree that on or one day before my departure south, I will identify myself as the original purchaser, by writing my signature on the back of this contract in the presence of the authorized agent of the Great Western Railway at Niagara Falls, who will witness the same. I also agree that this ticket shall not be honored for passage, if there are any alterations or erasures in signatures or dates stamped and written thereon.

"I further agree to sign my name, as a means of identifying myself as the original purchaser of this ticket, when-

ever called upon to do so by any of the conductors of the various lines over which this ticket reads, and that this ticket will be void if these conditions are not complied with. Fully understanding the above conditions, I accept.

Signature, JAMES M. CLOUD, *Purchaser*.
Witness, JAMES W. ROONEY, *Agent*.

Date of sale, June 21, 1880.

To Purchaser: Read the contract and take notice that the return part of this ticket must be stamped and your signature witnessed by the ticket agent of the Great Western Railway at Niagara Falls before it will be honored for passage. x 134.	CHARLES L. FITCH, G. P. A.

On its reverse side it was stamped by the agent who sold it to the plaintiff, and, as thus stamped it read as follows: —

AGENT OF THE MOBILE & OHIO R. R. WILL STAMP IN SPACE BELOW.

TICKET AGENT GREAT WESTERN RAILWAY WILL STAMP IN SPACE BELOW

MOBILE & OHIO R. R. June 21, 1880. J. W. ROONEY, *Tkt. Agt.*, MOBILE, ALA.	In compliance with my contract with the Mobile & Ohio Railroad, and lines over which this ticket reads, I hereby subscribe my name as the original purchaser of this ticket.

Witness: ______________

____

Ticket Agent Great Western Railway.

Dated, NIAGARA FALLS, ———, 187 .

Digitized by Google

The plaintiff, immediately after purchasing this ticket, went on board a passenger train of the Mobile and Ohio Railroad Company, and proceeded over the connecting railroads named therein to Niagara Falls, New York. He remained at Niagara Falls, at Buffalo, and in Northern Pennsylvania, until about the 4th of the following October, when he proceeded to get on board one of the passenger trains of the Great Western Railway to return to Mobile. Before going on board, he was asked by the conductor of the train to show his ticket, which he did, and, according to his testimony, which, for the purposes of the case, we shall take to be true, this conductor told him to go along in. He did so, and the conductor honored his ticket by taking up the coupon which called for that part of the transit; so did the conductor on the Michigan Central Railroad, which was the next connecting line; so did the conductor on the Chicago and Alton road; and this brought the plaintiff, in the course of his home journey, to the defendant's railroad at St. Louis. When the conductor of the defendant's road examined the ticket, he refused to honor it, on the ground that it had not been signed in the presence of the agent of the Great Western Railway Company at Niagara Falls, as required by the terms; and, accordingly, he put the plaintiff off the train at De Soto, Missouri.

We shall not set out the substance of the testimony upon the question of damages, but shall remark that there is no ground disclosed by the pleadings and evidence for the recovery of damages growing out of *the manner* in which the conductor put the plaintiff off its train; so that if the plaintiff was rightfully put off — that is if he had no right, under the terms of the contract, to continue his journey without paying fare, — he can not recover in this action.

This being the case made by the plaintiff as the basis of his right of action, the defendant introduced no evidence, but asked for an instruction in the nature of a demurrer to the plaintiff's evidence, which the court refused to give;

Digitized by Google

and thereupon, after being instructed by the court, the jury returned a verdict for the plaintiff for $2,000, $800 of which the plaintiff afterwards remitted.

We shall address ourselves only to the propriety of sending this case to the jury at all, because it seems to us entirely clear that the plaintiff had no case whatever. The only possible grounds on which the plaintiff could expect to recover in the face of the contract which he had thus signed, and with an essential condition of which he had not complied, was either that he had not had an opportunity of knowing the conditions of the contract at the time he signed it, or before the time came for performing the condition named therein; or else that this condition had been waived by an agent of the defendant, competent to waive it.

Upon the first point, there is no possible ground upon which a jury could say that the plaintiff did not have the amplest opportunity of informing himself fully of the conditions of this contract between the 21st of June, when he signed it at Mobile, and the fourth day of October, when he presented it to the conductor of the Great Western Railway at Niagara Falls. He must have exhibited it several times to the train conductors on his northward journey soon after he purchased it. He certainly had abundant leisure during the two days consumed in that journey to read it, and little else to do; and he says himself in his testimony: "I had forty chances if I had had any occasion to read it." Not to have read it under these circumstances, was the grossest negligence on his part, to say the least, for which he is now endeavoring to mulct this defendant in heavy damages. But we need not dwell on this point; for when a man has deliberately signed a written contract, and brings an action at law, in a court of justice, to assert rights acquired by that contract, he will not be heard to deny that it is his contract, or to assert that he did not know its contents. He must stand or fall upon the contract as he entered into it. If he chose to sign it without reading it, then he adopted its terms without reading them. He can not ask us to hold that it is

Digitized by Google

valid in part and void in part; valid so far as it works in his favor, and void so far as it works against him.

Then, as to the question whether there has been a waiver of the condition in this contract which required the plaintiff to identify himself to the agent of the Great Western Railway Company, at Niagara Falls, by signing his name on the reverse side of the ticket in the presence of such agent, such as was binding on this defendant, it is necessary to consider in the first place the nature of the contract. It is argued for the defendant, that this contract is not the joint contract of the various railroads named therein, and in support of this view, the decision of this court in the case of *Lin* v. *The Terre Haute, etc., R. Co.* (10 Mo. App. 125) is cited. Upon this point we distinctly limited ourselves, in that case, to the decision of what the case called for; and what we decided was this: that a contract of this kind, that is a railroad coupon ticket, which purports to take the holder over several connecting railways, becomes the contract of each one of such railway companies, as soon as such company adopts it by undertaking to carry the passenger under it. We did not think it necessary, under the facts of that case, to go further, and hold whether such a ticket is, in its inception, the joint contract of all the connecting carriers. The facts in this case call for the same ruling. This contract was adopted and ratified by each one of the connecting roads in carrying the plaintiff under it on the northward journey, and in taking up, through their train conductors, the appropriate coupons. By doing this through their train conductors, who were unquestionably their appropriate agents to perform such an act, each one of the connecting companies made this contract its own. We may properly go a step further, under the evidence, in this case. Mr. Rooney, who sold this ticket to the plaintiff, testified that it was sold under an arrangement between the connecting roads, under which they prorated the money received according to the mileage. As there is no evidence to contradict this, it may fairly be said

upon the evidence, that the contract which this ticket imported was a contract between this plaintiff and each of the connecting railway companies named in the coupons thereto attached, executed by himself on the one part, and by the Mobile and Ohio Railway Company, as the agent of the other connecting carriers, on the other part. But that it was a joint contract in the sense that any one of the connecting carriers could waive any of its terms and that this waiver would be binding upon the others, we decline to hold. Our opinion is that this contract became the contract of each one of the connecting carriers with this plaintiff, so far as it related to the transit over the road of such carrier. If we are right in this, any waiver, even by an authorized agent of the Great Western Railway Company, or the Michigan Central Railway Company, or the Chicago and Alton Railway Company, of any condition in the contract, would not be binding upon this defendant.

But it is not shown that the *train conductors*, of the roads named had any authority to waive this condition in the contract. By the terms of this contract, a special person was appointed before whom the remaining condition of the contract was to be executed, namely, "the authorized agent of the Great Western Railway at Niagara Falls." The reverse side of the contract shows that, by the term "authorized agent" the contract meant the "ticket agent" of the Great Western Railway. It would do violence to these terms to hold that a train conductor of the Great Western Railway was intended by them. Whether the ticket agent of the Great Western Railway at Niagara Falls could have waived a compliance with this condition of the contract so as to bind all the connecting carriers, we need not consider. Possibly he could have done so, if the ticket had been presented to him by the plaintiff, and if the plaintiff had offered to identify himself and sign his name on the reverse side of it, as required by its terms. *Gregory* v. *Railroad Co.* 10 Neb. 250. But where a particular agent is appointed to execute a stipulation

Digitized by Google

in a contract, it is clear of doubt that the execution of such stipulation can not be waived by another agent inferior in authority to the former. No case has been pointed out to us which sustains the plaintiff's position in this respect, and we believe that none can be found. On the contrary, it has been often held, as between conductors of the same railway company, that the unauthorized act of one conductor in honoring a ticket, which, by its terms, the company is not bound to honor, is not binding upon a succeeding conductor, to whom the same ticket may be presented by the same passenger, and that the refusal of the latter to honor it, and the consequent expulsion of the passenger, give him no cause of action against the company. The conductor can not be expected to accept the statements of passengers as to what previous conductors have done. *Dietrich* v. *Penn. R. Co.*, 71 Pa. St. 432; *Sherman* v. *Chicago, etc., R. Co.*, 40 Iowa, 45; *Hill* v. *Syracuse, etc., R. Co.*, 63 N. Y. 101; *Wakefield* v. *South Boston R. Co.*, 117 Mass. 544. For much stronger reasons, the voluntary act of the train conductor of one connecting railway in honoring a coupon ticket, which, by its terms, none of the connecting carriers is bound to honor, will not bind any succeeding carrier. To hold otherwise would destroy these contracts entirely, and would be equivalent to holding that railway companies can not make valid contracts of this kind.

These contracts are reasonable and valid. The condition which requires the passenger to identify himself to an agent of one of the companies, is a reasonable condition. It is intended to prevent the tickets from passing into the hands of third persons and being used by others in making portions of the transit where higher rates of fare are required than the special rates which the companies are able to make to through passengers traveling long distances.

We accordingly think that there was no case to go to the jury, and we therefore reverse the judgment and remand the cause. All the judges concur.

Digitized by Google

14 146
44 511
14 146
63 5
14 146
75 260

STATE OF MISSOURI, EX REL. N. C. HUDSON, Respondent, *v.* IDA HEINRICH, Appellant.

June 12, 1883.

1. JUDGMENTS — ERROR CORAM NOBIS. — A judgment rendered in consequence of an error of fact which does not appear of record may be vacated on motion, or petition in the nature of a writ of error *coram nobis*, of the party against whom it is rendered.
2. —— PRACTICE — ABUSE OF DISCRETION. — A refusal by the trial court to vacate a judgment upon full and uncontradicted evidence of an error of fact by reason of which the defendant had no notice of the action against him is a sufficient ground for a reversal of the judgment for an abuse of discretion by the trial court.
3. —— WANT OF NOTICE. — A judgment in a proceeding to collect back taxes, rendered upon service by publication, the order of publication being made upon a false return by the sheriff, is rendered upon an error of fact, where it appears that the defendant was at all times a resident of the bailiwick.

APPEAL from the St. Louis Circuit Court, BOYLE, J.

Reversed and remanded, with directions.

FINKELNBURG & RASSIEUR, for the appellant: When a judgment has been rendered against a party by default, and the court was laboring under a mistake of fact, the matter may be corrected under a writ of error *coram nobis.* — *Craig* v. *Smith*, 65 Mo. 536; *Latshaw* v. *McNees*, 50 Mo. 381; *Groner* v. *Smith*, 49 Mo. 318, 324; *Ex parte Page*, 49 Mo. 219, 294; 2 Tidd Pr. 1136; *Willins* v. *Wheeler*, 8 How. Pr. 116. No person can be deprived of his property without due process of law. — Const. Mo., Art. II., sect. 30; Const. U. S. Amendments, V. and XIV; *Pennoyer* v. *Neff*, 95 U. S. 714; Cooley's Const. Lim. 432.

M. HILTON, for the respondent: A motion in the nature of a writ of error *coram nobis* can not reach errors as to questions of fact passed on by the court. — *Richardson* v. *Jones*, 12 Gratt. 53; *Brandon* v. *Diggs*, 1 Heisk. 472;

Digitized by Google

Hawkins v. *Bowie*, 9 Gill & J. 428. A sheriff's return can be contradicted only in an action against the sheriff for a false return.—*Hallowell* v. *Page*, 24 Mo. 590; *Kearney* v. *Finn*, 11 Mo. App. 400. If this motion be considered as having been made under section 3684 of the Revised Statutes it can not be sustained, because there is no showing, and it is not claimed, that another trial would lead to a different result.—*Campbell* v. *Gaston*, 29 Mo. 343.

THOMPSON, J., delivered the opinion of the court.

The questions which we have to consider arise upon a motion in the nature of a writ of error *coram nobis*. The case is this: On July 29, 1881, a suit was commenced against Ida Heinrich, who is the plaintiff in this motion, under the act of 1877, known as the back-tax law, to recover the taxes for the year 1879, upon a lot of ground belonging to her, situated in the city of St. Louis. Summons issued in due form against Ida Heinrich, and on October 3, 1881, was returned by the sheriff as follows: "The within named defendant, Ida Heinrich, can not be found in the city of St. Louis." Thereafter, on October 15, 1881, an order of publication was granted by the court in conformity with the statute. The grounds on which the order was granted are recited in the order as follows: "Now at this day comes the plaintiff, by its attorney, and it appearing to the court from the return of the sheriff in this cause that said defendant can not be found in the city of St. Louis, and the court being satisfied that the ordinary process of law can not be served upon her, it is ordered," etc. Thereafter, at a succeeding term of the court, a judgment was rendered against Ida Heinrich by default in the ordinary form of judgments in such cases. A special execution, issued regularly from this judgment, so far as appears, was levied on the property named therein; the same was, so far as appears, regularly advertised by the sheriff, regularly exposed for sale, and sold to James Fargo for the price and sum of $1,005, he

Digitized by Google

being the highest bidder for cash, which sum, after satisfying the execution debt, interest, and costs, left in the hands of the sheriff the sum of $913.73, which, under the law, would belong to Ida Heinrich. At the first term succeeding this sale, namely, at the October term, 1882, the defendant, Ida Heinrich, filed this motion in the nature of a writ of error *coram nobis*, to vacate and set aside the judgment. There is thus no question of limitation; and if the plaintiff is otherwise entitled to the relief which she seeks, she can not be deprived of it on the ground that the motion was not seasonably filed.

The motion coming on to be heard, it was shown by uncontradicted testimony that Ida Heinrich is twenty-one years of age; that, in 1879, she bought the premises in controversy, it being then vacant property; that, during the same year, she erected a house thereon, the same being numbered 1111 South Eighth Street, which she rented to one Wippern; that this is all the property she owns; that it cost her in all about $3,500; that she was born in the city of St. Louis; has always resided in said city, has never been outside the city limits during her lifetime, not even by way of temporary absence; that, during the whole of the years 1881 and 1882, she resided at No. 1140 South Seventh Street; that she had lived there for nine years continuously. That the house where she thus lived is about two blocks from the premises in controversy, and that her tenant of such premises knew her residence; that the first she heard of his suit was from her father by adoption, Mr. Charles Haren, which was July 1, 1882; that she then heard that her house had been sold and that the purchaser wanted it; that, before that date, she had heard nothing about this suit; had never heard that any suit had been brought against her or her property; and had never received any notice or summons of any kind. It also appeared, without contradiction, that Mr. Haren, her father by adoption, had never heard of the suit until July 1, 1882, when Mr. Wippern, her tenant, told him that some-

Digitized by Google

body had come to demand rent. Notwithstanding this evidence, the court overruled this motion and petition of Ida Henrich, and she has brought the same to this court by appeal.

It is a well settled rule of practice, long recognized in this state, that, where a judgment is rendered against a party in consequence of an error of fact which does not appear on the record, the person against whom the same has been rendered may have it vacated by a motion or petition in the nature of a writ of error *coram nobis*. *Ex parte Toney*, 11 Mo. 661; *Powell* v. *Gott*, 13 Mo. 458; *Ex parte Page*, 49 Mo. 291, 294; *Groner* v. *Smith*, 49 Mo. 318, 324; *Latshaw* v. *McNees*, 50 Mo. 381, 384; *Craig* v. *Smith*, 65 Mo. 536. Where, on the hearing of such a motion, the evidence going to establish the error of fact is conflicting, an appellate court will not interfere with the discretion of the trial court in refusing to vacate the judgment. But if the evidence is all on one side and uncontradicted it will interfere, on the ground that such discretion has been abused. *Craig* v. *Smith*, *supra*.

That is this case. The evidence shows without any dispute that the court committed an error of fact in being "satisfied" from the sheriff's return or otherwise that the ordinary process of the law could not be served on this petitioner at the time when it made the order for publication. If the court was satisfied merely from an inspection of the sheriff's return, then, as the return was a false return, it committed an error of fact. If it required other evidence, which does not appear, there was equally an error of fact. The case does not differ in principle from the case of *Craig* v. *Smith*, last cited. There, one of the defendants, Van Camp, had not been served with process, but an attorney who had been retained by the defendants who had been served with process, filed an answer which purported to be an answer for the *defendants*. The court, evidently

Digitized by Google

regarding this as an appearance for all the defendants, rendered a judgment against all. On a petition in the nature of a writ of error *coram nobis*, the trial court refused, on an uncontradicted showing of these facts, to set aside the judgment as to the defendant not served; but the supreme court, on appeal, held that this refusal was an abuse of discretion, and reversed the decision of the trial court.

This is one of several hard cases under the back-tax law, which have come before us, in which judgments have been rendered against property for back taxes, and the property sold under execution, without the owners, although residents, all the time, of the city, having any knowledge of the proceeding, until the purchaser demanded possession or brought ejectment. In *State ex rel.* v. *Finn* (11 Mo. App. 400), we held that in such a case the defendant has no remedy by an action on the official bond of the sheriff, because, although the sheriff had made a false return, the independent judgment of the court intervened between his return and the order of publication, and hence his negligence was not the proximate cause of the injury. If we were right in that ruling, and if the learned counsel for the respondent in this case is also right in his view that this proceeding does not lie to correct the error of fact which led to the order of publication and the consequent assumption of jurisdiction by the court, then it follows that there is one case under our law where a valid judgment may be rendered in an ordinary suit in court against a person within the jurisdiction and amenable to the ordinary process of the court, without giving him any notice.

Whether a law which should authorize such a proceeding would be a valid law may, it seems to me, admit of much question. I should want to look seriously into the matter before passing lightly over the constitutional objection raised by the learned counsel for this appellant. If a suit

Digitized by Google

may be commenced specially against the property of any one within reach of the ordinary process of the court, and that person be notified in no other mode than by an advertisement printed in a newspaper, which may or may not, according to mere accident or chance, impart actual knowledge of the proceeding to him, and if in the particular case, it does not impart to him such knowledge, and a judgment is rendered therein, and by virtue of this judgment his freehold is taken from him, he remaining all the time in entire ignorance of the proceeding, I think the suggestion that he has been disseized of his freehold contrary to the law of the land, or what is synonymous in meaning, without due process of law, is a suggestion deserving of serious consideration. I can see little in such a law which deserves to be characterized as a law which proceeds upon notice and which hears before it condemns. But it does not seem necessary to pass upon this grave question in the proceeding before us.

The point to which our attention is drawn by the line of argument pursued by the counsel for the respondent is this: If we were right in our ruling in the case above cited, and if he is right in his contention that the error of fact which was indisputably committed by the circuit court in this case can not be reached and corrected in this proceeding, then it must be confessed that here is a grievous wrong for which the law affords no remedy. These acts, which deserve the name of judicial confiscations, of which several instances have already been before us, in which the victims have generally been ignorant women, may be multiplied without check or hindrance. The argument of counsel that this proceeding can not be sustained because the court had jurisdiction, proves too much; because the court only had such jurisdiction as it acquired by the erroneous determination of a fact; and hence, if this position be correct, we must say that a court can acquire jurisdiction by deciding that it has jurisdiction.

Digitized by Google

It must be borne in mind that this is not a collateral proceeding in which it is sought to impeach the title acquired by the person who purchased the property of the petitioner at the execution sale. It is a direct proceeding authorized by law between the original parties to the suit. The effect upon the title of such purchaser of sustaining this motion is a question which is not now before us.

Our decision is, that the judgment of the circuit court overruling this motion be reversed, and that the cause be remanded to that court, with directions to set aside the judgment against the property sued and to allow the defendant, Ida Heinrich, to appear and plead to the action. It is so ordered. All the judges concur.

14 152
42 247

Bank of Commerce, Respondent, *v.* B. M. Chambers et al., Appellants.

June 12, 1883.

1. Protest—Notice—Due Diligence.—Notice of protest sent by mail is insufficient where the holder and the indorser of the protested paper reside at the same place.
2. —— A notice of protest sent by mail to a member of congress at Washington, while he is engaged in discharging his duties as such, is good.
3. —— Where the indorser has different places of business and different places of residence, notice must be sent to the place where, upon diligent inquiry, it seems most likely to reach him with promptness.
4. —— Where the indorser is in the habit of receiving his mail at other than the general office of a place, which fact is unknown to the notary, notice addressed to the place generally is sufficient.
5. —— It is not essential to the validity of a notice of protest that it should be addressed to the post-office at which the indorser gets his mail if, in the usual course of the mail, it will be sent to and delivered from such office.
6. —— The law does not exact of the holder that he should give actual notice of protest to the indorser, but only that he should use reasonable diligence to do so.

Digitized by Google

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

DONOVAN & CONROY for the appellant: The notary did not exercise due diligence. — *Gilchrist* v. *Donnell*, 53 Mo. 591; *Wolff* v. *Burgess*, 59 Mo. 583. The service of notice was insufficient. — *Sanderson* v. *Reinstadler*, 31 Mo. 483; *Tang* v. *Dismer*, 71 Mo. 453.

ALBERT ARNSTEIN for the respondent: The notice sent to Washington, District of Columbia, was sufficient; that was Frost's "place of business" at that time, and the law presumes him to have been there. — *Chouteau* v. *Webster*, 6 Metc. 1; *Graham* v. *Sangston*, 1 Md. 59; Dan. on Neg. Inst., sect. 1027; Edwards on Bills and Notes, sect. 824; *Narr* v. *Johnston*, 9 Yerg. 1; *Tunstall* v. *Walker*, 2 Smed. &.M. 638, 657. A notice of protest may be sent either to the residence or to the place of business of the indorser; and this, although the residence is out of the city, and place of business in it. — *Bank of Columbia* v. *Lawrence*, 1 Pet. 582; *Deken* v. *Hall*, 87 Pa. St. 379; *Bank of Geneva* v. *Howlett*, 4 Wend. 328; *Bank of Utica* v. *Bender*, 21 Wend. 643. If it is claimed that Selma was not the domicile of defendant, then the rule that a notice is sufficient if sent to the place where a party receives his mail, though it is not his domicile, applies. —*Glascock* v. *Bank*, 8 Mo. 443; *Reid* v. *Payne*, 16 Johns. 218; *Bank* v. *Lawrence*, 1 Pet. 578; Pars. on Notes and Bills, 495. The Selma notice was sufficient, even though there was no post-office at Selma. The notice was delivered by the post-office department at Crystal City, the post-office at which Frost testifies he received his mail when at Selma. —*Central Bank* v. *Adams*, 11 S. C. 452; *Slaughters* v. *Farland*, 31 Gratt. 134; *Bank* v. *Carneal*, 2 Pet. 550. The law requires merely that the notary exercise reasonable diligence in forwarding the notice. —*Renshaw* v. *Triplett*, 23 Mo. 213; *Sanderson* v. *Reinstadler*, 31 Mo. 483; Dan. on Neg. Inst., sect. 1003.

Digitized by Google

THOMPSON, J., delivered the opinion of the court.

This is an action upon a promissory note for $5,000 against the defendant Chambers, as maker, and the defendant Frost, as indorser. There was a default as to Chambers, and an answer by Frost, under which he set up that he had not received notice of the non-payment of the note. The case was tried by the court without a jury; the judgment went against him, and he has appealed. The only exceptions which were reserved in the course of the trial related to two or three rulings upon points of evidence, which we shall not consider, because the appellant does not ask us to consider them here. No declarations of law were asked or given. In the state of the record the only assignment of errors which we shall consider is, that the judgment was against the evidence; and, as the action was an action at law, under well settled rules, if the bill of exceptions exhibits evidence which ought to have taken the case to a jury, if it had been tried by a jury, we can not reverse the judgment on this ground.

In this state of the record we shall only consider whether there was such substantial evidence as ought to have taken the case to a jury upon the question whether the notary who protested the note for non-payment exercised such diligence in notifying the indorser as the law-merchant requires. It has been said, that where the facts are undisputed, this question is a question of law, and this rule is certainly more beneficial to commerce than a rule which would remand the question of diligence to the decision of juries. *Bank of Columbia* v. *Lawrence*, 1 Pet. 578, 583; *Sanderson* v. *Reinstadler*, 31 Mo. 483. But this can not be regarded as an inflexible rule. There are many cases where it will be a fair question for the jury or the trier of facts, whether the holder or the notary exercised reasonable business diligence in endeavoring to find out the proper address of the indorser when a non-resident; and such seems to be the present case. Indeed, it will

Digitized by Google

appear from an examination of the decisions that the courts are in the constant habit of putting this question to juries under proper instructions.

The holder of the note, when it was protested for non-payment, was this plaintiff, a banking corporation, whose residence was the city of St. Louis, Missouri. The general residence or domicile of Mr. Frost was also the city of St. Louis; but he, at the time, was a representative from this state in congress. His family were, however, residing temporarily, as it would seem, at a place generally known as Selma, in Jefferson County, Missouri, which is merely a landing upon the river, without a post-office, the nearest post-office to which is Crystal City, about two miles and a half distant from the landing. He had previously had a residence at No. 1335 Garrison Avenue, in St. Louis; but the notary had called there to give notice of the protest of a previous note, and had been informed by some one there that Mr. Frost had removed out of the city. He had a general place of business at No. 513 North Sixth Street, in the city of St. Louis. He was also an attorney and counsellor at law, and had an office, where he transacted his legal business, in the building on Fourth Street which adjoins the Chamber of Commerce building, in St. Louis. When in Washington attending to his public duties as a representative in congress, his mail came regularly to the congressional post-office, which was in the capitol building.

The notary, who protested the note, addressed, according to his certificate of protest, five notices to Mr. Frost by mail, as follows: —

1. "Under cover, by mail, post-paid, and addressed to R. Graham Frost, Washington, D. C."

2. "Under cover, by mail, post-paid, and addressed to R. Graham Frost, St. Louis, Mo."

3. "Under cover and addressed to R. Graham Frost, at the place of business of his agent, Joseph T. Donovan, at St. Louis, Mo."

Digitized by Google

4. "Under cover, by mail, post-paid, and addressed to R. Graham Frost, at Selma, Mo."

5. "Under cover, by mail, post-paid, and addressed R. Graham Frost, left at the residence of his father, with the person in charge."

The evidence, which, for the purposes of this appeal, we must take most strongly for the plaintiff, as on a demurrer to the evidence, shows that the first notice was in fact addressed to "Hon. R. Graham Frost, Washington, D. C.," and that an additional notice was delivered by a special messenger to Gen. D. M. Frost, the father of this defendant, at the residence of the former in St. Louis.

It is not claimed that the second, third, and fifth notices were good notices, because, where both the holder and the indorser reside at the same place, a notice by mail does not satisfy the law. *Bailey* v. *Bank of Missouri*, 7 Mo. 467; *Barrett* v. *Evans*, 28 Mo. 331; *Gilchrist* v. *Donnell*, 53 Mo. 591. Nor can it be successfully claimed that the notice sent by the messenger to Gen. Frost was a good notice; for the law is not satisfied by a notice by a messenger delivered to a third person, unless it is delivered at the residence or place of business of the indorser; and there is no substantial evidence that the residence of Gen. Frost was one of the residences of this defendant.

1. We are of opinion that the general notice sent by mail and addressed "Hon. R. Graham Frost, Washington, D. C.," might properly have been regarded by the trier of facts as a good notice. There is evidence tending to show that, before the notary sent this notice, he went to the post-office and there inquired for Mr. Frost's address, and was told it was Washington, D. C., whereupon he mailed the notice to him as stated.

This was on the 23d of December, 1880. The congress was then in regular session, but it had, on the day previous, taken the usual holiday recess, as was shown by a copy of

Digitized by Google

the *Congressional Record* put in evidence. This recess was taken from the 22d of December until the 5th of January following. That a notice of protest sent by mail to a members of congress while engaged in discharging his public duties as such at Washington, is a good notice, has been held both in Massachusetts and in Mississippi. *Chouteau* v. *Webster*, 6 Metc. 1; *Tunstall* v. *Walker*, 2 Smed. & M. 638. In the former of these cases, Daniel Webster, a senator from Massachusetts, was, when the notice of protest was sent to him by mail, at Washington, D. C., attending a special session of congress at Washington, and he had at Boston, just as Mr. Frost had at St. Louis, a place of business and an agent to attend to his business; and yet the court, Chief Justice Shaw delivering the opinion, held that the notice thus mailed to him was a good notice.

The fact that congress had taken this temporary recess may not have been known to the notary, and, if known, it would not necessarily indicate to him that Mr. Frost would be absent from the capital during such recess. If it should indicate this it would not impair the legal sufficiency of the notice; because the controlling rule is that where the indorser has different residences and different places of business, the notice must be sent to the place where, upon diligent inquiry, it seems most likely to reach him with certainty and promptness. *Cabot Bank* v. *Russell*, 4 Gray, 169, 470, per Shaw, C. J.

Nor can the circumstance that the indorser was in the habit of receiving his mail, not at the general post-office in Washington, but at a special post-office in the capitol building, impair the legal sufficiency of this notice, unless this fact were known to the notary or would have been disclosed to him upon reasonable inquiry. That he did not know this appears from the evidence, and that it was not disclosed to him upon the inquiry which he made at the post-office in St. Louis also sufficiently appears. It seems that this post-office was the most proper place at which to make such an

Digitized by Google

inquiry, for it must be supposed from the nature of Mr. Frost's public duties at the time, that numerous letters were constantly received at the St. Louis post-office for transmission to him at his official residence at Washington. At all events, it can not be said that this testimony was not sufficient to take the case to the trier of the fact upon the question of diligence. It has been held several times, that where there are two or more post-offices in the town where the indorser resides, a notice sent by mail to the town generally will be a good notice, unless a reasonable inquiry would have disclosed to the holder or the notary the actual post-office at which the indorser commonly received his mail. *Burlingame* v. *Foster*, 128 Mass. 125; *Morton* v. *Westcott*, 8 Cush. 425; *Cabot Bank* v. *Russell*, 4 Gray, 167. The "towns" here spoken of are not cities or villages, but New England towns, which correspond to townships in Missouri and Illinois, each of which frequently contains several villages and several post-offices.

2. We also think that there was evidence from which the trier of the fact might have found that the notice addressed to Mr. Frost, at Selma, Missouri, was a good notice. It appears that there was a place, not a village, but a landing on the Mississippi River, in Jefferson County, Missouri, called Selma; that there had formerly been a post-office there, but that it had been discontinued and another post-office established at a place called Crystal City, about two and a half miles distant; that letters were still frequently addressed to Selma, Missouri, and that, in the regular course of the business of the postal department would be delivered at Crystal City, Missouri. This is shown by the testimony of the superintendent of the mailing department of the St. Louis post-office, who has been in the postal service since 1851. It further appears that the notary inquired at the place of business of Mr. Frost, at 513 North Sixth Street, St. Louis, and was there told that his family resided at Selma, Missouri. That the place is known as Selma sufficiently appears from the

Digitized by Google

testimony of Mr. Frost himself, who several times calls it Selma, and who admits having received at the Crystal City post-office letters addressed to him at Selma. On the day on which this notice was sent Mr. Frost, according to his own testimony, passed through St. Louis on his way from Washington to visit his family, and, on the following day, he joined them at Selma. It has been held, as applicable to such a state of facts as this, that it is not essential to the validity of such a notice that it should be addressed to the post-office, *eo nomine*, at which the indorser is in the habit of receiving his mail. If it be addressed so that in the ordinary course of mail it would go to and be retained at such post-office, it is sufficient. Thus, where such a notice was addressed to the indorser "at his domicile near Tompkins Bend, parish of Carroll, Louisiana," it was held a good notice, although there was no post-office by the name of Tompkins Bend in the Parish of Carroll; the evidence showing, that in the ordinary course of mail the letter would reach the indorser. *Ledoux* v. *Morgan*, 3 La. An. 344. So, where the notice was addressed to the indorser "at the parish of Rapides," and the evidence showed that there were several post-offices in that parish, but that the principal one was Alexandria, and that a letter so addressed would be received at this post-office and retained, and that the defendant had a box at such office and was in the habit of receiving his mail there, it was held a good notice, the court saying: "Any address of the notice which will insure its transmission to the proper office, is a compliance with the requirements of the law." *Citizens' Bank* v. *Walker*, 2 La. An. 791.

In these cases, the law-merchant does not exact actual notice, but it exacts reasonable diligence of the holder or his agent, in an endeavor to communicate actual notice; and what conduct will satisfy this demand of the law has been thus expressed by an eminent judge: "It is the duty of the holder, or of the notary, or other officer or agent employed

Digitized by Google

by him, to make reasonable inquiries at the proper sources, to ascertain the residence or place of business of the indorser, at what post-office, one or more, in the same or another town, he is accustomed to receive his letters; and, in the absence of such information, to find out the post-office nearest, or, in some other respect, most convenient to his residence; and then address an official notice by mail, and to such post-office as that it would be most likely to reach him certainly and promptly." *Cabot Bank* v. *Russell*, 4 Gray, 167, 170, per Shaw, C. J.

It seems to us that there was evidence from which the trier of the fact might properly have inferred that the notary had done this in this case. And we might add, that after sending five notices addressed as above stated, and also delivering one by messenger to General Frost, and considering that this defendant was at the time a well known public man, it would have been extraordinary if some of them had not reached him.

We think the judgment ought to be affirmed. It is so ordered. All the judges concur.

---

14 160
38 375

14 160
102m549

14 160
61 85

14 160
166s 402

MARTHA HUNT, Respondent, *v.* MISSOURI RAILROAD COMPANY ET AL., Appellants.

June 12, 1883.

1. PRACTICE—SEPARATE TRIALS.—An exercise of discretion by the trial court, in refusing separate trials of joint defendants, in a civil action, will not be reviewed on appeal, unless it clearly appears that the discretion was abused.
2. —— CUMULATIVE CHALLENGES OF JURORS.—Concurrent acts of negligence by several defendants tending to a common result injurious to the plaintiff, do not constitute several causes of action, and do not entitle such defendants to separate trials, or to cumulative rights of peremptory challenge.

Digitized by Google

3. DAMAGES — SEVERAL ACTS OF NEGLIGENCE BY SEVERAL DEFENDANTS. — Where a building contractor negligently suspends the guy rope of a derrick too low for a street car to pass under it and the driver of the car negligently drives against the rope so as to cause the derrick to fall upon and kill a passenger on the car, both the contractor and the railway corporation may be held liable in an action by the widow of the deceased passenger.

4. CONTRIBUTORY NEGLIGENCE. — In the absence of any regulation forbidding passengers to ride on the platform of a street car, contributory negligence can not be imputed to a passenger from the fact of his being injured while so riding on the platform.

5. NEGLIGENCE — PROOF OF. — Though all the witnesses may testify that there was no negligence on the part of the defendant, the jury may nevertheless find that there was negligence, if the physical facts of the case and the manner of the injury raise a necessary inference to that effect.

APPEAL from the St. Louis Circuit Court, BOYLE, J. *Affirmed.*

DYER, LEE & ELLIS, for the appellants: There is no presumption of negligence against a common carrier by reason of the fact that a passenger is injured on its conveyances. — *Yerkes* v. *Packet Co.*, 7 Mo. App. 267. When the facts as to negligence are clear and undisputed, the court should declare to the jury the inference to be drawn from the facts. — *Bell* v. *Railroad Co.*, 72 Mo. 41, 58.

JOHN WICKHAM, for appellant Higgins: The court erred in refusing appellant Higgins a separate trial. — Rev. Stats., sect. 3603; *Spaulding* v. *Suss*, 4 Mo. App. 551; *Colgrove* v. *Railroad Co.*, 6 Duer, 430. The court erred in overruling appellant Higgins' objection to the introduction of any testimony against him under the petition which fails to state any concurrent negligence rendering both defendants liable. — 2 Redf. on Rys. (5th ed.) 248, and note 10. The court erred in taking the question of contributory negligence, which is one of fact, from the jury by instructing them, on behalf of the respondent, that there was no evidence in the case of any contributory negligence on the part of George B. Hunt directly con-

Digitized by Google

tributing to his death. — *Barnes* v. *Bellefontaine R. Co.*, 50 Mo. 140; *Smith* v. *Union R. Co.*, 61 Mo. 591; *Hulsenkamp* v. *Citizens' R. Co.*, 37 Mo. 553, 554; *s. c.* 34 Mo. 54; *Beers* v. *Housatonic R. Co.*, 19 Conn. 57; *Clark* v. *Eighth Av. R. Co.*, 36 N. Y. 135; Thompson on Car. Pass. 444 *et seq.* The court erred in refusing to instruct the jury that if they found there was any want of care on the part of the deceased, Geo. B. Hunt, or on the part of the car driver, which contributed directly to the injury which caused the death of said Hunt, they should find for appellant Higgins. It was error in the court to hold the appellant Higgins liable for the neglect of the car driver, which was the active cause of the injury. — *Thorogood* v. *Bryan*, 8 C. B. 115; *Brown* v. *N. Y. Central R. Co.* 31 Barb. 385; *s. c.* 32 N. Y. 577, 602; *Mooney* v. *Hudson River R. Co.*, 5 Robt. 553; *Lake Shore R. Co.* v. *Miller et al.*, 25 Mich. 277; *Lockhart* v. *Lichtenthaler*, 46 Pa. St. 164.

W. C. JONES and A. R. TAYLOR, for the respondent: The granting of separate trials to defendants is within the discretion of the trial court. — Rev. Stats., sect. 3603. Higgins was guilty of negligence in suspending a rope across a street, where cars were passing, so low to the ground as not to let the cars pass. And the negligence of each defendant continued up to the moment of the fall of the derrick and the killing of the man. This made the defendants jointly and severally liable. — 2 Thompson on Neg. 1088; *Colgrove* v. *Railroad Co.*, 6 Deur, 430; Thompson on Car. 284, 289; *Bennett* v. *Railroad Co.*, 36 N. J. 225; *Rider* v. *Freeman*, 50 N. H. 420; *Barrett* v. *Railroad Co.*, 45 N. Y. 628; *The State* v. *Misercam*, 64 N. Y. 138; *Chapman* v. *Railroad Co.*, 19 N. Y. 341.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sues under sections 2121 and 2122 of the Revised Statutes, for damages sustained in the killing of her

Digitized by Google

husband, while he was riding on a street car of the defendant corporation. There was a jury verdict for $5,000 in favor of the plaintiff and judgment accordingly against both the defendants.

The testimony tended to show that defendant Higgins was a contractor for reconstructing the "Dorris Row" of buildings, on the north side of Olive Street in the city of St. Louis. He used in his work a movable derrick, about thirty-eight feet in height, which was placed on the sidewalk and leaned toward the building, from five to seven feet from the perpendicular. It was secured in position by two guy ropes, about eighty-seven feet apart at the lower ends which extended from the top of the derrick to the other side of the street, and were there tied to upright posts, at the height of six or eight feet from the ground. These guys were, in fact, one continuous rope, passing through pulleys at the top of the derrick. There was also a rope which held the top of the derrick towards the building. This was tied to an upright piece of scantling, within an upper story, which was nailed at the top and bottom to the joist and the floor, and was otherwise reinforced by secured bits of scantling. Some ten or fifteen minutes before the accident hereinafter mentioned, the derrick was moved about two feet westward, and the west guy rope which, until then, had been fastened at a point forty feet from the other, was moved and tied to a post forty-seven feet further west. There was a good deal of testimony tending to show that the workmen, in making these adjustments, used much care in providing against a possible contact of the ropes with passing street cars. The plaintiff's husband, a passenger, was standing upon the rear platform of car No. 93 of the defendant railroad company, going east. It appears that the west guy rope was caught by a corner of the ventilator, or cupola, on top of the car, with the effect of pulling the derrick over, so that it tore away the scantling to which the inner stay rope was fastened, and, falling upon the rear

Digitized by Google

platform of the passing car, killed the plaintiff's husband. There was testimony tending to show that, a few minutes before the accident, and after the new adjustment of the derrick and ropes, a car, whose height exceeded that of No. 93, had passed along in the same direction, without any mishap, and that this occurrence was in view of the driver of No 93. The derrick had been in use at that place for several months before, and was similarly used for a long time after the catastrophe, without any interference with the passing cars.

A special panel of eighteen jurors was summoned, on the application of the defendant corporation. When the case was called for trial, each defendant formally demanded a separate trial, which was in each instance refused by the court. Each defendant claimed a right of peremptory challenge of three jurors. These claims were also denied.

Our statute (Rev. Stats., sect. 3603) provides that where there are several causes of action united in a petition, or where there are several issues, and the court shall be of opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials. The question is clearly left to the sound discretion of the court, whose action therein can not properly be reviewed on appeal, unless it plainly appears that the discretion has been abused. We can not perceive that there has been any such abuse in the present instance. Nor do we discover that any fair reason existed for the increased expense, delay, and inconvenience of a separate trial for each defendant. There was a single cause of action, to wit: that the plaintiff had been deprived of her husband, and his life, through the negligence of the defendants. The issue to be tried was, whether the defendants (or either of them) were guilty of a negligence which caused the death. Neither the cause of action nor the issue was duplicated by the fact that the negligence may have appeared in two or more forms. If two men, one

Digitized by Google

with a club and the other with a dagger, assault and wound a third person, every blow with the club is a wrong committed by the man who wields it, separate from and independent of the dagger thrusts inflicted by the other, and *vice versa*. Yet no one will deny that both may very properly be sued or prosecuted and tried together for the common injury. The theory upon which the plaintiff here sued and recovered was that the acts of negligence which caused the death were not merely concurrent, but co-operative and interdependent, as between the two defendants and the doings of each. Thus, the supposed negligence on the part of defendant Higgins, in leaving the guy rope too low, or in insufficiently mooring by the stay rope and scantling within the building, would have been harmless but for the negligence of the car driver in driving against the guy, instead of stopping when he reached it. On the other hand, no amount of reckless and rapid driving would have done injury without the co-operative negligence which misplaced the guy rope and left the stay rope fastening too weak to withstand the shock of the car running against the guy. Certain it is that the acts or omissions of both defendants, whether negligent or not, were necessary to effect the injury for which the plaintiff sues. There is no legitimate antagonism between the several defences, as counsel seem to suppose. If there was negligence on the part of one of the defendants, this fact would make it neither more nor less true that there was negligence, or a total absence thereof, on the part of the other. If one defendant could show such prudent care and management as would disprove every imputation of negligence, his defence would be complete, whatever might be the success or failure of his codefendant in the same regard. The most that one defendant could hope for from impeaching the conduct of the other, would be the sharing of their responsibility upon a verdict against both. But this could not be anticipated unless both were in fault.

Digitized by Google

Again: if the defendant contractor and the defendant corporation had agreed together beforehand that the one should misplace the guy and the other should drive against it in order to produce harm, there could be no question of their joint liability for the consequences. Why, then, should there be any when their concurrent actions imply concurrent negligence, whose common tendency is to produce a single injurious result? Both the setting of the trap, and the springing of it at the right moment, were necessary to the fatal capture. There was no error in the refusal of separate trials; and this being true, it follows naturally that there could be no separate and cumulative rights of peremptory challenge.

We can not better present our views of the law applicable to this case, than by here copying the instructions which were given by the trial court. They cover the whole case, and are, in our view, entirely unexceptionable. If we are correct about this, the defendant's demurrer to the evidence was properly overruled, since there was substantial evidence tending to establish every hypothesis of fact in the plaintiff's favor. The instructions leave nothing for argument except upon the weight of the testimony, with which we have nothing to do. The court instructed for the plaintiff thus: —

1. "The court instructs the jury, that if they believe from the evidence in this case that plaintiff was the lawful wife of George B. Hunt at the time of his death, as herein stated, and that the defendant is and was a corporation and common carrier of passengers at the time herein stated, and owned and operated the street railway and car herein mentioned; and if the jury believe from the evidence, that on the twenty-third day of May, 1881, the defendant Missouri Railroad Company received said George B. Hunt upon one of its cars to be carried as a passenger east, along Olive Street, and that whilst said George B. Hunt was by said Missouri Railroad Company being carried, as such passenger, on its car, east along Olive Street, at a place between

Digitized by Google

Eleventh and Twelfth Streets, in the city of St. Louis, a heavy timber, known as a derrick, fell upon said George B. Hunt and killed him; and if the jury believe from the evidence that said derrick was standing upon the north side of Olive Street, and was supported by a rope or ropes suspended across Olive Street, and if the jury believe from the evidence that said rope or ropes, so suspended across Olive Street, were not sufficiently high from the ground to enable the street car in which said George B. Hunt was being carried as such passenger to pass under without striking against said rope; and if the jury believe from the evidence that the servants of defendant Missouri Railroad Company, in charge of said car, drove said car against said rope so supporting said derrick with such force as to cause said derrick to fall; and if the jury believe from the evidence that defendant Missouri Railroad Company did not use due care in so driving said car against said rope and causing said derrick to so fall, then the plaintiff is entitled to recover against the Missouri Railroad Company.

2. "And if the jury further believe from the evidence that the defendant Higgins, by his employes, had suspended said rope or ropes attached to said derrick across Olive Street, so near to the ground that said car in which said George B. Hunt was being carried as such passenger could not pass under said rope without striking it, and that said Higgins or his employes were negligent in so causing said rope to be so suspended across said street, and that said rope being so suspended across said street contributed directly to cause said car to strike against it and throw said derrick down as aforesaid, then the defendant Higgins is liable in this action, and plaintiff is entitled to recover against both defendants such damages as the jury may deem fair and just, with reference to the necessary injury resulting to plaintiff from the death of her husband; but the verdict cannot exceed five thousand dollars.

Digitized by Google

3. "The court instructs the jury that there is no evidence in this case of any contributory negligence upon the part of George B. Hunt, the deceased, directly contributing to his own death."

Of its own motion the court instructed as follows: —

4. "The jury are instructed that in the erection and use of the derrick, and in placing the ropes thereto attached, it was the duty of defendant Higgins to exercise such diligence and caution as prudent persons would have exercised under similar circumstances, in order to prevent persons or vehicles passing upon the street from being injured by such derrick or ropes; and the failure of said defendant or of his employes to exercise such diligence or caution would constitute negligence on his part. And if the jury believe said defendant was guilty of negligence, as thus defined, and that such negligence directly contributed to cause the said derrick to fall on and kill the plaintiff's husband, then plaintiff is entitled to recover against said defendant Higgins.

5. "The court instructs the jury that if they believe from the evidence that the defendant, the Missouri Railroad Company, received George B. Hunt upon its car as a passenger, then it was the duty of said company and its employes in charge of said car, in carrying said Hunt as such passenger, to use all the care, diligence, and foresight which careful and prudent persons engaged in such carriage of passengers could reasonably exercise under similar circumstances, in order to prevent injury to said Hunt while riding on said car. And if the jury believe from the evidence that said defendant company or its employes, while carrying said George B. Hunt as such passenger, failed to exercise such care, diligence and foresight, the failure so to do would constitute negligence on the part of said company. And if the jury find from the evidence that the said defendant company was guilty of negligence, as thus defined, and that such negligence directly contributed to cause the derrick to fall upon and

Digitized by Google

kill the said Hunt, the plaintiff is entitled to recover against said defendant, the Missouri Railroad Company.

6. "Unless the jury find that the fall of the derrick was occasioned by the negligence either of one or both of the defendants the plaintiff is not entitled to recover, and the jury should find in favor of the defendants. If, however, the jury believe from the evidence that both of the defendants were guilty of negligence which directly contributed to cause the fall of the derrick then they should find against both defendants; and if they believe from the evidence that the fall of the derrick was caused by the negligence of one defendant only, then their verdict should be against such defendant, and in favor of the other defendant."

In behalf of the defendant company the court instructed: —

7. "That the railroad company is not the insurer of the lives or safety of the passengers in its cars. And if the jury find from the evidence that, at the time the injury in question occurred, the employes of the defendant railroad company having charge of the car on which deceased was a passenger, were using such care, diligence and foresight as careful and prudent men could reasonably be expected to exercise in the discharge of the duties of their particular employment under the same circumstances, then the jury should find in favor of said defendant railroad company.

8. "The court instructed the jury that as against the Missouri Railroad Company the burden of proof is upon the plaintiff to show that the death of George B. Hunt was occasioned by the fault or negligence of the conductor or driver of the car in question.

9. "The jury are instructed by the court, that if they shall find and believe from the evidence that the derrick in use by the defendant Higgins fell upon the car of the defendant company and thereby caused the death of plaintiff's husband, and that the falling of said derrick was not caused by the negligence of the defendant company, then the plaintiff can not recover against said railroad company."

Digitized by Google

For defendant Higgins the following instructions were given: —

10. "The jury are instructed that the burden of proof of negligence rests on the plaintiff; and unless they are satisfied from the evidence that the defendant Higgins or his employes were guilty of negligence which contributed directly to cause the accident which resulted in the death of George B. Hunt, they must find for the defendant Higgins.

11. "If the jury find from the evidence that the car in question was driven rapidly, that the rate of speed at which it was driven at and near the place of the accident contributed directly to produce the disaster which resulted in the death of plaintiff's husband, independently of any negligence on the part of defendant Higgins, they must find for defendant Higgins.

12. "If the jury find from the evidence that the defendant Higgins and his employes, in using the derrick in question, exercised such care and caution as a prudent and careful man would ordinarily have used under like circumstances, and that the fall of the derrick was caused by something over which they had no control, they must find for defendant Higgins."

No instructions faithfully representing the law could, as we think, have put the case more fairly before the jury. It is objected that the words "due care," in the first instruction as numbered by us, are left without any definition; so that it was possible for the jury to be misled by them. There was no such possibility. The extent and kind of care required, and therefore "due," were pointed out in the clearest way in the instructions which we have numbered 4, 5, 7, 12, in this opinion.

There was not the least foundation for a charge of contributory negligence on the part of the plaintiff's husband. The only thought offered in support of this charge is that if he had been seated within the car instead of standing on the rear platform he would not have been struck by the fatal

Digitized by Google

derrick. If this be good reasoning, then every unfortunate who was ever blown up in a steamboat explosion was guilty of contributory negligence in going on the boat, or in being within reach of the boiler. Had he stayed on shore, or had he occupied some other part of the boat, he might have been safe. It does not appear that, as is customary on steam railway trains, there was any regulation or request by the company that passengers should not occupy the platform. It does not appear that derricks have a known habit of falling upon the rear platform rather than any other parts of passing cars. It might be easier to show that an act of the defendant company's servant did more than anything else to justify the responsibility fixed upon his employer by this judgment. The car driver testifies that instead of looking at the guy rope when he approached it he was looking the other way, at a workman on the building; that when he saw the derrick falling he whipped up his horses, and thus made it strike the rear platform instead of the middle of the car. Had he not done this the fall might have killed some passenger seated within the car. But it would have spared the life of the plaintiff's husband, and so have barred this action.

We have carefully considered the instructions which were offered by the defendants and refused by the court. We find in them nothing to which either defendant was entitled that does not sufficiently appear in the instructions given. We can not agree with learned counsel for the defendants that, as to the one or the other of them, there was no evidence of negligence proper to be left to a jury. If there is any evidence of a material fact in issue, no amount of force or conclusiveness in the testimony which rebuts it will authorize a court to take the question away from the triers of fact. The present case is one in which the undisputed physical fact — the disaster itself, without aid from its antecedents and surroundings — may indicate to a practical minded jury the unquestionable presence of negligence as its cause. Thus, the guy rope was in fact low enough to

Digitized by Google

be struck by the passing car, with whose customary height, structure, and hourly excursions along the track all parties were familiar. The juror, in his practical familiarity with current events and with their physical and moral causes, may legitimately consider that whatever the witnesses may say, the fact remains that the rope could not have been thus low if reasonable and proper care had been taken to fasten it at a safe elevation. He may also consider that the car driver in fact drove against the rope when it was too low for his car, and was in full view as he approached it, when a reasonable and proper amount of care would have prompted him to stop his horses instead. This view may well be strengthened by the consideration that, by the driver's own story, he was looking away from the rope when he drove up to and against it with sufficient force to pull down the derrick. We are not laying down a rule that negligence may always be inferred from the mere fact of personal injury by means of an agency under control of the party charged. We mean only to say that there may be ways of inflicting injury which are so easily and naturally guarded against by a moderate degree of care or forethought that they seem to be inseparable from an exhibition of the opposite qualities; and that so a rational inference of negligence may arise from the manner of the injury alone. When counsel insist that in this case all *prima facie* indications of negligence were met by overwhelming proofs of the contrary, and ask us to say that their clients left nothing undone which extreme care and prudence could suggest in the premises, we must answer that these propositions were exclusively for the jury and were fairly submitted to them in the instructions. We can not reverse their finding, whatever might be our own impressions from the weight of the testimony. All the judges concurring, the judgment is affirmed.

Digitized by Google

14 173
85 27

THE STATE OF MISSOURI, Respondent, v. JOHN HAYES, Appellant.

June 12, 1883.

1. PRACTICE — IMPERFECT RECORD — CERTIORARI. — If the transcript from the trial court omits a refused instruction, and the appellant does not ask for a *certiorari* or take any step for having the record perfected, but submits his cause to the appellate court upon the record as it stands, he can not demand a reversal because of the incompleteness of the record.
2. —— BILL OF EXCEPTIONS — AFFIDAVITS. — Objections to the rulings of the trial court, or to improper remarks of counsel in argument, will not be considered on appeal, when they are preserved only in affidavits filed with the motion for a new trial, and are not preserved in the bill of exceptions.
3. CRIMINAL LAW — JURISDICTION — CHANGE OF VENUE. — "An act in relation to criminal procedure in the city of St. Louis," etc., approved March 26, 1881, having been declared unconstitutional by the supreme court in *The State* v. *Kring* (74 Mo. 612), an order of the criminal court requesting the judge of the twenty-fifth judicial circuit to hear an application for a change of venue and to try the cause, was void and did not deprive the judge of the criminal court of jurisdiction to vacate the order and dismiss the application.
4. —— EQUALITY OF THE LAWS. — Section 19, of the Revised Statutes, page 1514, does not deny to citizens charged with crime in the city of St. Louis the equal protection of the laws.

APPEAL from the St. Louis Criminal Court.
LAUGHLIN, J.

Affirmed.

J. J. MCBRIDE and C. O. BISHOP, for the appellant: The appellant is entitled to have his case reviewed upon a complete record. — *The State* v. *Reed*, 67 Mo. 36. The order calling in Judge Burton was proper and lawful under Revised Statutes, section 1877, which repealed all acts inconsistent therewith. — *The State* v. *Kring*, 74 Mo. 612; *The State* v. *Houser*, 28 Mo. 233.

CHARLES P. JOHNSON and HUGO MUENCH, for the respondent: The criminal court was not divested of jurisdiction by Judge Burton's laying the case over for a few

Digitized by Google

days. — *The State* v. *Kring*, 74 Mo. 622–627; *The State* v. *Webb*, 74 Mo. 333; *The State* v. *Greenwall*, 72 Mo. 305, 306.

LEWIS, P. J., delivered the opinion of the court.

The defendant appeals from a conviction of murder in the first degree.

The transcript shows that at the close of the testimony the defendant asked for an instruction, which the court refused to give. The instruction does not appear, and in its place is a note by the clerk, thus: "The instruction referred to can not be found among the records in the case. It is either lost or mislaid." Because of this omission from the transcript, the defendant asks for a reversal of the judgment, on the authority of *The State* v. *Reed* (67 Mo. 36). The opinion in that case says that "the appellant suggested a diminution of the record, stating various defects, omissions, and incorrect statements in the records supported by the affidavit of his attorney, and upon his motion a *certiorari* was awarded. To this a return was made, stating that the clerk's office had been broken open, on a night stated, and nearly all the papers in this case stolen. The record sent up in obedience to the last *certiorari* is in fact greatly more defective than the first record, which was so defective, in our opinion, as to authorize the writ." That was a very different case from the present. The defendant, before submitting his cause to the appellate court, signified his unwillingness to have it heard and determined on the imperfect record, as it stood. He employed all the means provided by law for securing a complete record, and the result showed that such a record was impossible of procurement. Nothing could be presumed against a party who thus stood upon his rights, waiving nothing, and the supreme court could not do otherwise than direct another trial. But in this case the defendant suggested no diminution and asked for no amendment,

Digitized by Google

while he voluntarily submitted his case to be heard and determined upon the record as it stood. How can he now be heard to say that the record is insufficient for a proper understanding of the matter at issue? To allow this, would be to assume that the defendant submitted his cause upon condition only that the judgment should be reversed. In civil cases the rule is universal that, after joinder in error, neither party can suggest a diminution or ask for a more perfect record. The reason is, that by joining in error, each party consents that the cause shall be heard upon the record as it stands. In criminal cases no assignment of errors is necessary, but the effect is the same when the cause is regularly submitted upon brief or argument. It is our duty here to decide the cause upon the record submitted to our examination. If we can not learn from this how the trial court decided a particular point, or, in fact, what the point was, we are bound to presume that the court correctly applied the law. The defendant does not attempt to show how, if at all, his case was prejudiced by the refusal of the instruction. For aught that appears, the paper was only temporarily mislaid, and could have been recovered and produced in obedience to a *certiorari*. To forego an application for this effective writ at the proper time, and then ask us to assume that it would have been unavailing, involves a trifling with the court that should not be tolerated in any case.

The defendant complains that the court improperly overruled his challenges of two jurors for cause, and improperly permitted counsel for the state to use unjustifiable language in addressing the jury, in prejudice of the defendant's rights. The answers given by the jurors on *voir dire*, and the remarks made by the state's attorney, are preserved in affidavits filed in support of the motion for a new trial, but do not otherwise appear in the bill of exceptions. We have on several occasions explained the rule, that whatever occurs in presence of the court (not being pertinent to the

Digitized by Google

record proper) is matter of exception, and must be preserved for review by historical statement in the bill of exceptions, which is authenticated by the signature of the judge who presided at the trial. We can not take the affidavits, by whomsoever made, as conclusive of the facts sworn to, because the better evidence would be, an official narrative from the judge whose business it was to adjudicate upon them. This, of course, does not apply to anything that occurs *in pais*, or beyond the personal observation of the judge. *The State* v. *Zumbunsen*, 13 Mo. App. 592; *The State* v. *Pollard*, *post*. It is enough to say, that the objections thus presented on behalf of the defendant can not be here considered by us, for the reasons already stated. We may add, however, that, upon a reading of the affidavits, we find in the matters there detailed nothing which, even if properly presented, would make us feel authorized to overrule the action of the criminal court in refusing a new trial.

It appears from the record that the defendant made application to the criminal court, accompanied by his affidavit, for a change of venue, on the ground of prejudice in the inhabitants of the eighth judicial circuit. The court, in conformity with an act of the general assembly then supposed to be in force, entitled "An act in relation to criminal procedure in the city of St. Louis, and to repeal sections 18 and 19 of chapter 2 of the appendix of the Revised Statutes of Missouri, concerning the criminal court," approved March 26, 1881, made an order requesting Hon. Chas. G. Burton, judge of the twenty-fifth judicial circuit, to hear the application for a change of venue, and to try the cause. Judge Burton duly appeared in answer to this call, but the matter was laid over until a later day. Before the time arrived for judicial action by Judge Burton, the case of *The State* v. *Kring* (74 Mo. 612), was decided by the supreme court. In that case it was held that the act of March 26, 1881, was unconstitutional and void. It

resulted from this decision, that the proper procedure for a change of venue, on account of the cause alleged by the defendant, lay in an application to a judge of the St. Louis circuit court. The criminal court therefore vacated its order calling upon Judge Burton, and struck from its files the application for a change of venue. The defendant then applied to a judge of the circuit court, in accordance with section 19 (Rev. Stats. 1509), who denied a change of venue, because he was of opinion that the matters stated in the petition were untrue. The defendant next made application to the criminal court for a jury to be summoned from St. Louis County. This was denied, and the trial proceeded in usual form in the criminal court.

It is insisted for the defendant that there was error in these proceedings. An objection is raised, that the judge of the criminal court "was disqualified to sit in the cause, until the matter raised in the affidavits supporting the application for change of venue had been passed upon by some competent tribunal." There is nothing in this. The first application was, according to *The State* v. *Kring* (*supra*), void for all purposes, and created no disqualification of the judge. The judge did not, in fact, sit on the trial, until after the defendant's application had been passed upon by a judge of the circuit court, who was the competent tribunal. The point of the remaining argument appears to be, that when Judge Burton appeared in answer to the request, and sat to make an order of continuance, he acquired an exclusive jurisdiction over the matter pending, and the order vacating the request was void, because Judge Laughlin, the regular officer, had no jurisdiction to make it. It might be sufficient to say, that both the defendant's application and the court's request being void and unauthorized by the existing law, no jurisdiction was needed in anybody, to prevent their having any valid or effectual operation, whether to divest Judge Laughlin of his accustomed control over the proceedings of his court, or for any other pur-

Digitized by Google

pose. But the argument seems to rest chiefly upon an idea which strangely confounded the person of the judge with the office whose functions are, for the time being, manifested through his agency. In trans-Atlantic countries official authority or jurisdiction may belong to a person by virtue of heredity, or of titular identification, or other incident, and simply because he is that person. But under our institutions, authority and jurisdiction belong to the office, and not to the man.

The man may be changed or replaced from time to time: the office remains a unit. The man's authority exists only while he is the legally designated exponent of the office. There is an impersonal entity known as "the court," whose authority and jurisdiction are perpetuated through all changes of its personal exponents. Let it be admitted for the present, that Judge Burton was lawfully called to temporary occupancy of the criminal court bench. While there, he was, for the expressed objects of the call, as effectually the custodian and administrator of the court's powers as was the regular incumbent before and after him. But when he withdrew to his own circuit, he carried with him no more of the criminal court's powers or jurisdiction than if he had died or resigned, instead. Those powers and that jurisdiction were no man's personal rights. They remained, as ever, with the court, to be manifested through its succeeding personal exponent, whoever he might be. A court, having lawfully acquired jurisdiction over a cause, may, upon established legal principles, proceed to a final determination. But an application of this rule to any supposed personal rights of the judge, would be repugnant to fundamental law.

We are not able to perceive, and the learned counsel for defendant does not inform us, in what manner section 19 of the act creating the St. Louis criminal court "denies to the citizens of St. Louis city, charged with crime, the equal protection of the laws, with other citizens of this state." That section has been the law in force for

Digitized by Google

about twenty-eight years, and has so long stood in like relation with the laws upon the same subject, applicable to other parts of the state. We are not aware that it has ever been seriously questioned on the constitutional ground referred to.

Finding no material error in this record, we must affirm the judgment of the criminal court. All the judges concur.

D. S. IRONS ET AL. v. THOMAS J. PRICE, Appellant, and EMPORIA NATIONAL BANK, Respondent.

June 19, 1883.

INTERPLEA — EQUITY — TRIPARTITE CONTRACT — ESTOPPEL — WAIVER.— An oral tripartite contract was entered into by A, a cattle dealer at Emporia, Kansas, B, a banking corporation at the same place, and C, a cattle broker at St. Louis, to the following effect: A was to make purchases of cattle and draw on C for the purchase-money and expenses; B was to advance cash on the draft, and forward it for collection, the cattle purchased being at the same time shipped to C, and a memorandum was to accompany each draft, showing that it was drawn against the shipment. Under this agreement, a purchase was made of two hundred and five head of cattle; the money was advanced by B, and the cattle were duly shipped by A; but, before they reached St. Louis, C failed, and the draft was dishonored. By arrangement, the cattle were received and sold by D, the plaintiff, for account of whom it might concern. A and B interpleaded for the proceeds, and B. recovered. *Held*, that the recovery was proper. A could not set up any technical rights as shipper or owner in the face of the agreement; his claim, as asserted, not being that of a general creditor, it was immaterial that B had not perfected a lien on the property. An estoppel arose in favor of B, because of the agreement and the money advanced; and it was, further, immaterial that C was largely indebted to A on general account, outside of this transaction.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

SCOTT & LYNN and E. J. O'BRIEN, for the appellant; BROADHEAD & HAUESSLER, of counsel: If Hamer, Stewart

Digitized by Google

& Burnside had any claim for the money advanced on the cattle in question and assigned it either in law or equity, such assignment is only an assignment of a chose of action and therefore the bank took just what rights the assignors, Hamer, Stewart & Burnside had in the matter, subject to all legal and equitable set-offs, Phelps & Price, or either of them might have against the assignors. Price had a claim of $13,000, Phelps had a claim of $2,000, and Phelps & Price had a claim jointly of $2,000. The defendant bank, at most, only stands in the shoes of Hamer, Stewart & Burnside, therefore our claims against Hamer, Stewart & Burnside, being more than the amount in controversy is a good legal and equitable set-off against it.—2 Rev. Stats. 1879, p. 659, sects. 3867, 3868, 3871, ch. 64; *Kent* v. *Rogers*, 24 Mo. 233; *Weiss* v. *Wahl*, 5 Mo. App. 408; Waterman on Set-off and Counter-claim, sects. 103, 104, pp. 118–121 and cases there cited.

The draft in question is drawn generally and does not purport to be drawn on any particular fund whatever. In order to create an equitable assignment it is absolutely necessary that it should be drawn specifically on the fund equitably assigned.—*Watson* v. *Wellington*, 1 Russ. & Myl. 602; *Phillips* v. *Stagg*, 2 Edw. Ch. 108; *Luff* v. *Pope*, 5 Hill (N.Y.), 413; *Coperthwaite* v. *Sheffield*, 3 N. Y. 243; *Winter* v. *Drury*, 5 N.Y. 525; *Hopkins* v. *Beebe*, 26 Pa. St. 85; *Greenfield's Estate*, 24 Pa. St. 232, 240; *Clemenson* v. *Davidson*, 5 Binn. 398; *M. & F. Bank*, v. *Jauncy*, 3 Sandf. (N. Y.) 257; *Jones* v. *P. W. L. & T. Co.*, 13 Nev. 359; *Bank* v. *Bogy*, 44 Mo. 13; *Wheeler* v. *Stone*, 4 Gill, 38. The indorsement on the back of this promissory note is no part of the instrument itself, but is a simple memorandum made by Stewart for his own benefit, as he says, to inform his partners that cattle had been shipped.—*Roby* v. *Ollier*, L. R. 7 Ch. App. 695; *Brenner* v. *Johnson*, L. R. 5 H. L. Cas. 157.

Digitized by Google

NOBLE & ORRICK and C. N. STERRY, for the respondent: "A promise to pay out of a particular fund when received will be specifically enforced in equity, and thus operate as an assignment, especially when the circumstances are such that the promise was given as security for money loaned, and was relied upon as such by the lender." — *Spain* v. *Hamilton*, 1 Wall. 604; 3 Dill. 287; *Hart* v. *Railroad Co.*, 13 Metc. 99–108; *Walker* v. *Mauro*, 18 Mo. 564; *Taylor* v. *Lynch*, 5 Gray, 49. "When a factor advances money to his principal upon goods shipped his principal to him to be sold on commission, the factor becomes a special owner of the property to the extent of the money advanced." — *Valle* v. *Cerre*, 36 Mo. 577; Story on Ag., sect. 111; *Halliday* v. *Hamilton*, 11 Wall. 560; *Gray* v. *Foster*, 67 Mo. 512.

LEWIS, P. J., delivered the opinion of the court.

The plaintiffs obtained an order of the circuit court, directing them to pay into court the sum of $11,811.27, less $500 for expenses, and further directing that the defendants, Phelps & Price, on the one hand, and the Emporia National Bank, on the other, interplead as several and adverse claimants of the fund. The terms of the order were obeyed and issues were joined accordingly. Upon a hearing of the testimony the court sustained the claim of the Emporia National Bank, and so gave judgment. Defendant Price appealed.

Phelps & Price were dealers in cattle at and near Emporia, Kansas. Hamer, Stewart & Burnside, partners, were cattle dealers and brokers near the stock yards in the vicinity of St. Louis. Phelps & Price purchased from one Martindale about two hundred and five head of cattle, and shipped them to Hamer, Stewart & Burnside for sale. This firm failed before the cattle reached St. Louis; and, by an arrangement between Burnside and other parties interested, the cattle were turned over to Irons & Cassiday,

Digitized by Google

the plaintiffs, to be sold for account of whom it might concern. They sold the stock to one Burke for $15,211.27, and paid over $3,400, part thereof, to Phelps & Price. The residue of this sale money constitutes the fund in controversy. Phelps & Price maintain their claim on the ground that they were owners and consignors of the property for their own benefit, and that they never parted with either ownership or possession until sale was made for them by Irons & Cassiday. If this were the whole case, no equities intervening in favor of other parties, their legal claim would of course be unquestionable. They allege, moreover, that Hamer, Stewart & Burnside were indebted to them on other accounts to an amount exceeding the sum in controversy.

The bank's allegations in support of its claims are in effect as follows: Stewart, of the firm of Hamer, Stewart & Burnside, was at Emporia, Kansas, representing his firm and transacting its business. A tripartite agreement was made orally by and among the two cattle firms or their representatives and the bank, to the following effect: when Phelps & Price should buy a lot of cattle, under the arrangement, Stewart would draw a sight draft upon his firm for the necessary purchase-money, in favor of the Emporia National Bank. The cattle purchased would be shipped to Hamer, Stewart & Burnside for sale. The bank would then honor the check of Stewart, or of Phelps & Price, as might be necessary, to consummate the transaction in favor of the original vendor, for the amount of the draft less certain commissions or fees. The draft would be indorsed with a memorandum of the cattle shipped, and would be transmitted by the bank to its correspondent in East St. Louis, to be there paid by Hamer, Stewart & Burnside out of the proceeds of their sale of the cattle. It was understood that in each instance the draft should be considered as drawn against that particular shipment of cattle. The bank's interplea does not so summarize the features of the agreement. But the details given of a pre-

Digitized by Google

liminary understanding between Stewart and the bank, with its recognition by Phelps & Price, and their active co-operation in whatever was necessary to carry out its provisions, result in a showing of the common compact whose effective terms were as above stated.

There had been a number of previous transactions in conformity with this compact, and the present one was in accordance therewith, up to the arrival of the cattle at the stock yards in East St. Louis.

If the case thus presented by the bank was substantially verified in the proofs, we know of no principle upon which the judgment should be reversed. Let us suppose that all the parties were present together at every step in the proceedings. Phelps & Price agree with Martindale for the purchase of his cattle. "I," says the bank, "will furnish the purchase-money necessary for this trade, on condition that the cattle be sent to Hamer, Stewart, & Burnside, at East St. Louis, who will there sell the stock and, out of the proceeds, repay to me the money so advanced." All agree to this. The money is paid over, and the cattle are sent on their way — by whom, or in whose name, is not of the least consequence, so far as the rights of any party to the agreement are concerned. The cattle are sold, not by Hamer, Stewart & Burnside, but by another firm of brokers, designated by them, and not objected to by any one. Can it be possible for Phelps & Price then to claim the sale-money without a violation of their contract with the bank? Can they plant themselves upon any technicalities of apparent ownership or possession, to annul the purpose of the contract, without a fraud upon the bank which, in faithful performance on its part, has paid out its money at their instigation and request? Surely not. The questions answer themselves. It is true that in this case, all the parties were not constantly together and acting in unison, as in the case supposed. But if the several acts

Digitized by Google

done were in pursuance of an agreement upon which all had united, the effect must be precisely the same. Were this not so, agreements would be valueless in law. It can not be said that all the testimony sustains the hypothesis of fact advanced on the part of the bank. There are conflicts on material points. But, we think, after a careful examination, that the evidence strongly preponderates in favor of that hypothesis, and of the conclusion reached by the trial court, as appears by the judgment rendered. Mr. Hood, vice-president and managing officer of the bank testified to the effect, that Phelps was introduced to him by Stewart, and that both Phelps & Price were present at the conversation which ensued. Stewart said that Phelps was there to buy cattle, and that he, Stewart, wished to pay for them, as had been done in former seasons, by draft on Hamer, Stewart & Burnside, against the cattle, which would be shipped to that firm. Hood said that his bank would pay the drafts so drawn, upon the understanding that Stewart's firm would take them up from the proceeds of the cattle, when sold. Phelps & Price offered no objection to the arrangement. Afterwards Price told Hood that he and Phelps were operating together, and was thereupon permitted by Hood to draw a check in payment for cattle purchased from one Tague, upon the strength of the arrangement made by Phelps, Stewart, and Hood, as before recited. The first item in the present transaction was a check drawn by Phelps on the witness' bank, in favor of Martindale, from whom the cattle were purchased. Hood refused to honor this check, until Stewart had first drawn a draft, and assured him of the shipment of the cattle, in accordance with the standing arrangement. The check was then certified, and afterwards paid to the holder. Phelps had, otherwise, no funds in the bank to draw upon. The witness further testified that there were numerous similar transactions with the same parties, all done under the same agreement.

Digitized by Google

The interpleader Phelps was a witness in his own behalf, and when asked on cross-examination about the conversation described by Mr. Hood, and as to each particular item of the understanding so testified to, gave an apparently hesitating assent that there was some conversation of the sort, but he could not recollect exactly what it was. He admitted that, when he drew his check on the bank in payment for cattle purchased, he had no funds there to meet it, but dealt with the bank under the arrangement, whatever it was, that had been talked over between himself and Hood and Stewart. There were several such transactions, including the one here in controversy. In each instance, as in this, a draft was drawn and paid on a specific shipment of cattle. There was other testimony to the same general effect while, on the part of Phelps & Price, there was testimony tending to show that these dealers made the purchases on their own account, being aided therein by Stewart, for the benefit of his firm, as cattle brokers, and that the transactions with the bank were founded upon the personal credit, alone, of Hamer, Stewart & Burnside. As already intimated, the testimony in support of the first hypothesis appears to us to be more satisfactory.

The appearance in this case of the draft, and of the checks used, raises no question upon the law of commercial paper. They simply indicate the methods employed in consummating the whole agreement, by which the rights of the parties must be here determined. We do not perceive that the law concerning liens has much, if any thing, to do with the present inquiry. Counsel argue with much learning and elaboration that the bank did not properly fortify itself with a lien upon the cattle, or their proceeds, for payment of the draft. But here is no case of an effort by outside creditors or claimants to seize upon property proceeds by virtue of legal process, against which noth short of a pre-existing lien might prevail. So far from

Digitized by Google

this, the contest here concerns only a claim made by parties who have solemnly promised not to claim, and who have received a full consideration for their promise. The amount, $3,400, received by Phelps & Price, out of the sale money, represented a clear profit upon the transaction, and this profit was made possible to them by the bank's advance upon the draft. It is useless to assert that the bank's rights were in any way modified by an existing indebtedness from Hamer, Stewart & Burnside to Phelps & Price. The latter's agreement and transaction with the bank implied a waiver of such indebtedness, if any there was, as to this particular fund. There could not be a more satisfactory case of estoppel, as against any attempt on the part of Phelps & Price to deprive the bank of the fruits of its money advanced. Counsel for the appellants present a good many points, fortified by numerous authorities, intended to show that there was no equitable assignment to the bank by Hamer, Stewart & Burnside, and no lien created by them to secure payment of the draft, as against Phelps & Price, who were not only the consignors, but also general creditors of the failing consignees. The argument and the cases cited might be appropriate, if Phelps & Price stood in no other relation as parties, than that of creditors of the delinquent firm. But counsel show us no case in which a party, having been enabled to purchase property with money advanced by another upon an agreement for repayment, from a sale of the property, was permitted to assume the position of a stranger to the agreement, to lay a claim in violation of its provisions, and to assume that there was only a race of diligence between equally unfettered and innocent creditors. The authorities relied upon have not the least application to the facts of this case, as we understand them to be shown by the testimony, and to have formed the basis of the judgment below. All the judges concur in affirming the judgment.

Digitized by Google

14 187
111m 291
14 187
125m 70
57 418
14 187
77 282

STATE OF MISSOURI, EX REL. THOMAS WALSH, v. CHARLES F. VOGEL, Respondent.

June 19, 1883.

1. JUDGMENTS BEAR INTEREST. — Every judgment in a civil action bears interest, though it be not therein expressed, at the rate which the cause of action bore.

2. —— MANDAMUS — EXECUTIONS. — A judgment founded upon another judgment which bore ten per cent interest being paid with six per cent thereon, *mandamus* will lie to compel the clerk of the court to issue execution for the balance of four per cent.

3. —— PRACTICE — CLERKS. — The judgment being silent as to interest, it is the duty of the clerk to ascertain from the record the rate of interest which it bears.

4. ADMINISTRATION — JUDGMENTS. — An order upon an administration by the probate court to pay over a sum of money is a judgment.

APPLICATION for *mandamus*.

Peremptory writ awarded.

G. M. STEWART, for the relator.

JAMISON, COLLINS & JAMISON, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was an application for an alternative writ commanding the respondent, who is clerk of the St. Louis circuit court, to issue execution upon a certain judgment in favor of plaintiff's relator, or show cause why he should not do so. The alternative writ was waived. Respondent appears and demurs to the petition. The facts which are admitted by the demurrer are as follows: —

Thomas J. Dailey was administrator of the estate of James Roddy. Dailey, as administrator, began a replevin suit against one Patrick Roddy to obtain possession of certain personalty which Dailey claimed as belonging to the estate of his intestate. Walsh, the relator here, was one of the sureties on the replevin bond. Judgment was against Dailey in the

Digitized by Google

replevin suit for the value of the property and costs. Execution was issued on this judgment against Walsh, under which he was compelled to pay $3,088.60. On motion, under the statute, in the circuit court, plaintiff recovered against Dailey, as administrator, on account of these matters. The judgment upon the motion was, "that said Thomas Walsh recover of said Thomas J. Dailey, administrator of the estate of said James Roddy; and, that said Thomas J. Dailey, as said administrator, pay over to said Thomas Walsh, out of the assets and properties of said estate, the sum of $3,283.20, with ten per cent interest from this date, till the said amount is paid, together with the costs of this motion." Dailey, not having obeyed this order of court, Walsh brought suit against him and the sureties upon his bond, as administrator, in which action Walsh obtained judgment for the penalty of the administration-bond against the sureties, Farrar and Cavender. This judgment recites that the court "doth assess his damages, by reason of the breaches in the petition mentioned, at the sum of $3,297.20. It is, therefore, considered by the court that plaintiff recover of the defendants the debt and damages aforesaid, as found and assessed, and have execution against them for said damages and for the costs and damages herein expended." This judgment, on appeal, was affirmed, both by the court of appeals and by the supreme court. The breaches mentioned in the petition were the matters set out above. Afterwards, on April 5, 1883, the defendant Farrar paid all costs, and also paid to Walsh $4,162.75, being the amount of damages assessed in the circuit court with interest at six per cent from date of the judgment. No more has been paid; and Walsh has demanded of the circuit clerk to issue execution for the balance of $900, which he claims he ought to have, on the theory that the judgment bears interest at ten per cent. The clerk refuses to issue execution, on the ground that the judgment bears interest at six per

Digitized by Google

cent, and is, therefore, satisfied by the payment by Farrar on April 5th.

It is only by virtue of the statute that a judgment bears any interest. Freem. on Judg., sect. 441. The statute provides (Rev. Stats., sect. 2725) that "interest shall be allowed upon all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment. All such judgments and orders for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts; and all other judgments and orders for money shall bear six per centum per annum until satisfaction is made."

The judgment on the motion of Walsh against Dailey in the replevin suit, bore interest at ten per cent from date until paid. This was the language of the order; and this was in accordance with the statute, which provides (Rev. Stats., sect. 3904) that "in all cases where judgment is given in any court upon any bond, bill, or note for the payment of money or delivery of property against the principal debtor and any surety therein, and such surety shall pay the judgment or any part thereof, he shall be entitled, upon motion, to a judgment in the same court against the principal debtor for the amount he has paid with ten per cent interest thereon from the time of payment, together with costs." As this judgment bore interest at ten per cent, it is plain from the language of the statute cited above, that the judgment upon this judgment must bear interest at the same rate. "Where any specific sum is adjudged to be due from defendant to plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of jurisdiction." 2 Bla. Com. 465. In order that the judgment should bear interest, it was not necessary that the court delivering the judgment should say so and make this statement a part of the judgment, because the statute expressly

Digitized by Google

provides that every judgment shall bear interest. In order to determine the amount of interest which the judgment bears, if the judgment is upon contract, it is only necessary to ascertain from the record what interest the contract bore, and, as to that, in the present case, there can be no question.

It is not only the right, but the duty, of the clerk to look to the record in issuing execution to determine the legal effect of the judgment. So where, in judgment on *scire facias* to revive judgment against an executor, the judgment directed a levy upon goods and chattels, and said nothing about the lands of the testator, it was held that the execution did not depart from the judgment in requiring a levy upon lands, because, the nature of the judgment being apparent, the manner of enforcing it is prescribed by law. *Houck* v. *Cross*, 67 Mo. 152. Where a general judgment was rendered in attachment, where there was service by publication only, and the court had jurisdiction of the *res*, but not of the person of the defendant, though the judgment was general in form, it was held to be the duty of the clerk to look to the nature of the proceedings and the jurisdiction of the court, and to issue only that special execution which the law and the character of the service warrants. The general judgment might have been corrected by a *nunc pro tunc* entry, but until this was done, it would authorize the issuing of a special execution only. *Massey* v. *Scott*, 49 Mo. 278; *Clark* v. *Holliday*, 9 Mo. 711.

It is contended by counsel for respondent that the judgment on the motion of Walsh bore ten per cent interest until the rendition of the judgment upon the judgment, and only six per cent after that. But this is contrary to the express terms of the order as set out above. The order upon Dailey was a judgment; and the sureties upon his bond are liable because of this order, and to the full extent of it. *The State to use* v. *Dailey*, 4 Mo. App. 172. The obligation of Dailey and that of his sureties was one assumed vol-

Digitized by Google

untarily by contract. The cases of *City* v. *Allen* (53 Mo. 44), *Ransom* v. *Cobb* (67 Mo. 375), and *Ownby* v. *Ely* (58 Mo. 475), cited by respondent, seem not to be in point. These cases hold that a judgment which includes a fifteen per cent penalty imposed by statute for non-payment of a special tax, is not to bear fifteen per cent interest. But the obligation sued upon in these cases is not by contract; the judgment is no evidence of the existence of a contract; and there was no contract. The obligation to pay the special tax is one imposed by the state without regard to the will of the property holder. The obligation of the administrator and his sureties, is, on the contrary, one of contract; and the order, made in accordance with the statute, that the sum bear ten per cent interest till paid, is one of those cases for which "special provision is made by statute" alluded in *Ownby* v. *Ely* (*supra*)

We are of opinion that the demurrer must be overruled; and, in accordance with what we understand to be the wish and intention of respondent, that the judgment upon the demurrer should be final, the peremptory writ will be awarded in accordance with the prayer of relator. All the judges concur.

STATE OF MISSOURI, Respondent, v. MATHEW LEWIS, Appellant.

June 26, 1883.

1. CRIMINAL LAW—DELIBERATION.—Mere excitement of the accused at the time of the homicide does not negative the idea of deliberation.

2. —— DEGREES OF MURDER.—Provocation by words which will reduce the grade of a homicide from murder in the first to murder in the second degree, must be caused by words of the victim.

3. —— PREMEDITATION—INSTRUCTIONS—PRACTICE.—An instruction which erroneously defines "premeditatedly" as "thought over," is not ground for a reversal where there is no evidence of any degree of homicide other than murder in the first degree.

Digitized by Google

4. —— PRACTICE.—It is not error to refuse to allow the jury, in the sheriff's custody, to visit the place of the homicide.

APPEAL from the St. Louis Criminal Court, LAUGHLIN, J. *Affirmed.*

C. O. BISHOP, for the appellant; Deliberation can not be presumed, but must be proved. — *Murray* v. *The Commonwealth*, 79 Pa. St. 311. As to the test of sufficiency of provocation. —See 2 Bishop Cr. L., sect. 710; *The State* v. *Will*, 1 Dev. & Bat. 167–169. The instruction defining murder in the first degree is fatally erroneous. —*The State* v. *Peyton*, 12 Mo. App. 568; *The State* v. *Rose*, 12 Mo. App. 567; *The State* v. *Ellis*, 74 Mo. 207; *The State* v. *Kotovsky*, 74 Mo. 247.

JOSEPH R. HARRIS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

Defendant was convicted of murder in the first degree, for killing his wife, Mary Ann Lewis, in St. Louis, on the 13th of October, 1876.

The defence was an *alibi;* in support of which, several witnesses were examined. The entire testimony has been read with care. The defendant's case was a very weak one. Though six years and a half from the date of the homicide had elapsed before the trial, and many persons who would otherwise have been summoned for the state as present at the time of the occurrence, were dead or gone to parts unknown, the testimony for the state was overwhelming, that defendant was the man who committed the homicide.

It appears from the testimony that the deceased and the defendant were persons of color, and husband and wife. The deceased was a young woman of twenty-two, of slight frame; the defendant, a heavy built man of middle age. The deceased was employed during the day as house-servant in a house of prostitution inhabited by white women. The defendant frequently before the homicide, and on the

Digitized by Google

morning of that day, and on the day before, told his wife that he would kill her. He told other persons that he would cut her throat; and especially on the morning of the homicide told a negro associate, who remonstrated with him for his cruelty to his wife, that he had made up his mind, and that he would cut her throat before nightfall. The wife slept at nights with her sister in a tenement house in a room occupied by her sister, also occupied by a colored man and his wife. The night before the homicide, the defendant assaulted his wife in bed with a knife. During the morning of the homicide he sharpened and exhibited two knives with which he said he would cut her throat. About dusk on the evening of Friday, October 13th, before the street lamps were lit, but after the lights were lit in the neighboring stores, defendant, who was loitering in front of the passage-way which led from the street to the room in the tenement building where his wife slept at night, saw her coming down the street with a pitcher in her hand. He walked towards her, the handle of his knife sticking out of his pocket, and as he approached her, a colored man, whom they both knew, spoke to her. She returned the salutation of this colored man, and held out her hand to him. Defendant came up and said: "I thought I had told you not to speak to your sons of bitches," and struck her a blow with his fist, behind the ear, which caused the blood to spurt from her face. She fell upon her knees, and said: "Mat, is it any harm to speak to people?" He ordered her to go into the house. She said that the white people had sent her for beer. He told her to go and get it and come back. She went to the beer saloon at the corner. Whilst she was gone, the women who gathered round remonstrated with defendant for his cruelty. When his wife came back he ordered her into the house again. He then said: "You damned bitch, I am going to kill you, near as it is to night, before the lamps are lit." She was afraid to go in and beg-

Digitized by Google

ged Emma Horner, — not present at the trial,— one of the women of her color standing by, to go with her. Deceased wanted first to carry the beer to her employers; but this woman suggested that she was too bloody. Defendant then went up the passage-way followed by the deceased, who came along holding to the apron of the woman Horner. Screams were immediately heard, and the deceased ran out holding her hands to her throat from which the blood was spouting. She ran to the nearest drug store; then came back, and rolled on the sidewalk till the ambulance wagon took her to the dispensary where she died within an hour of the occurrence. She was told by the physician on her arrival that her case was hopeless, and she herself said she was dying. An officer who was present was, by the state, put on the stand to testify as to her dying declarations, but the question was not pressed. It does not appear why, as it would seem that the foundation was sufficiently laid, and that the woman was well aware that she had but a few minutes to live. Defendant went at once to the house of an acquaintance in another part of the city, where he stated that he had cut his wife, and expected her to die, and asked advice as to the best method of getting out of town. He was arrested at Washington, Missouri, eleven months after the homicide.

1. It is contended that the trial court erred in refusing to instruct as to murder in the second degree, inasmuch as there was evidence tending to show a want of deliberation, and an immediate provocation calculated to produce heat of blood or passion. If this means that if a man orders his wife into the house, to butcher her at his leisure, and then cuts her throat as soon as she is off the street, if he chance to be in a bad humor at the time, this is not murder in the first degree, it is not the law. If it does not mean this, we are at a loss to see what it does mean in view of the evidence. We see no evidence tending to show any provocation

Digitized by Google

calculated to rouse the fury of anybody but a mad man. The deceased herself seems to have been timidly submissive. And if, after he had struck her down, something was said by the surrounding women not calculated to soothe the feelings of the man who dealt the blow, nothing of this kind can palliate the subsequent offence, or reduce to a lower grade of murder the act of inviting or ordering her into the house and immediately cutting her throat in the passage. It is true, that deliberation is essential to murder in the first degree, and that the supreme court defines deliberation to mean "in a cool state of the blood;" but, by this cool state of the blood, is meant by the supreme court, as we are told in *The State* v. *Ellis* (74 Mo. 207), "not in a state of passion engendered by reasonable provocation." "If," says Judge Hough, in that case, "at common law, precisely the same state of mind which, when produced by a blow, will constitute the killing manslaughter, is produced by such grievous and degrading words of reproach as are naturally and justly calculated to produce that state of mind, the instant killing in such a state of mind, of the provoker, will be murder. * * * The decision of this court also declared it to be murder; but not murder in the highest grade; because in such a case, although there may be premeditation as defined by this court, there is no deliberation within the meaning of the law. * * * What words of reproach and attendant circumstances will be deemed a just cause of provocation, and constitute the homicide murder in the second degree, is, in every case a question of law for the court." Endeavoring, as we shall always do, closely to follow the rulings and intimations of the supreme court in distinguishing between the two degrees of murder under the statute, we think that where a man deals a violent blow to his wife, who thereupon falls upon her knees before him using words only of excuse and submission, if the bystanders express their opinion of the man's brutality in rough

Digitized by Google

language, and he thereupon orders her into the house and then and there, and in precise accordance with his previously declared intention, cuts her throat in the alley-way, though he may have been laboring under some mental excitement at the time, superinduced by his own violence, and perhaps increased by the language of the bystanders, there was nothing in these circumstances, or in such language, which will be deemed a just cause of provocation, and constitute the homicide murder in the second degree. We take it, that the provocation by words which will reduce the homicide from murder in the first, to murder in the second degree, and show the absence of "deliberation" as now defined, must be a provocation moving from the victim of the homicide; and that the mere fact that the murderer was "excited" at the time does not negative the idea of deliberation.

2. The instruction as to murder in the first degree was erroneous, because it defined "premeditatedly" as meaning "thought over." This is declared to be error in *The State v. Ellis* (74 Mo. 221). But the error was harmless, because, as we have said, there was no evidence of any other homicide than murder in the first degree; the element of deliberation was shown by uncontradicted testimony, and there was no room for any instruction as to the lower grade of murder.

3. We see no error to the prejudice of defendant in the matter of the admission of evidence. The testimony as to threats by defendant to kill deceased, made within two days of the homicide and on the day itself, and of an attempt to cut her the night before, was competent, not as part of the *res gestæ* of the transaction, but because, from these threats, and the other circumstances in evidence, a fair inference of malice might be drawn. The testimony of the policeman McMahon was properly admitted to show that the dying woman realized her condition. This testi-

Digitized by Google

mony did not become incompetent from the fact that the state neglected to utilize it by proceeding to inquire as to any dying declarations, for which we think a sufficient foundation was laid. Of this the defendant can not complain. The witness Griffith was asked where he last saw defendant, to which he gave an answer not responsive to the question of the prosecuting attorney. This ought not to be regarded as prejudicial to the state. The court at once ordered the answer stricken out.

4. The court gave two instructions as to the defence of *alibi*. These instructions were not inconsistent; and we do not see that they furnish any ground for complaint on the defendant's part. Of one of them the state, perhaps, might have complained with some reason.

5. Counsel for prisoner, before the cause was submitted, asked that the jury be permitted, in proper custody, to view the place where the homicide was committed. If this had appeared to the court to be important for enabling the jury to understand the testimony, it might have been well enough to permit it. But it was certainly no error to refuse the application, especially six years and a half after the offence. Judge Napton, in *The State* v. *Sanders* (68 Mo. 205), intimates a doubt whether, in Missouri, the jury in criminal cases can be allowed to view the place where the crime was committed, for the purpose of determining as to the credibility of the statements of the witnesses. In the present case, I can not see what light such a visit could have thrown upon the case, even supposing that the premises remained unchanged as to the position of the staircase, and the manner in which the passage-way was lighted.

No ground appears for disturbing the judgment. With the concurrence of all the judges, it will be affirmed.

Digitized by Google

THE STATE OF MISSOURI, Respondent, *v.* CHAS. DAVIS, Appellant.

July 3, 1883.

In a prosecution for larceny from a dwelling house by entering at night and ransacking rooms of the upper stories while the owners were below, it is competent to show that the wagon into which the defendant jumped to drive away, and in which he was immediately arrested, contained at the time of the arrest a billy, a pistol, and an outsider.

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Affirmed.

THOS. B. HARVEY, for the appellant.

J. R. HARRIS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

Defendant was indicted for larceny from a dwelling house. He was convicted of the offence, and sentenced to two years' imprisonment in the penitentiary.

The testimony tended to show, that at the date named in the indictment, whilst the family inhabiting No. 2104 Lafayette Avenue were at supper, about an hour after dark, the servant girl, who had gone from the dining-room to get the paper at the front door, saw a man coming down the stairs from the second story with a bundle in his hand. She gave the alarm and the gentleman of the house and his son ran to the front door, where they saw clothing strewed on the pavement and two men on the sidewalk about seven hundred feet off, hurrying away. They gave chase. The two men seen, after going about four hundred feet, jumped into a wagon standing near the pavement. There was another man in this wagon who drove hastily away, but turned up Nicholson's Place, which is a *cul de sac*. The persons in pursuit called an officer to their assistance. The

Digitized by Google

officer caught the horse and told those in the wagon to throw up their hands. Instead of doing so, they jumped to the ground. Defendant was identified by the police officer as the man driving. He and another occupant of the wagon ran off. The third man, whose dress and general appearance answered the description of the man seen by the servant girl, drew a pistol, and was shot by the policemen. The other two men were arrested by policeman who had been attracted by the pistol shooting. In the wagon, were found, under the seat, a pistol, a billy, and a pair of outsiders. The persons who had entered the house of the prosecuting witness had ransacked all the closets and bureaus of the first and second floors of the house, had moved a heavy trunk from one room to another, and carried off some clothing and trinkets.

Only one ground is urged for disturbing the conviction. It is, that the evidence as to these tools was improperly admitted. That evidence was given by the police officer. Objections to its competency and relevancy were properly saved. For the sake of brevity, we put the testimony in narrative form, using the language of the witness.

"I found, in the wagon, right under the seat, on the bottom of the wagon, one loaded revolver, a billy, and a jimmy or outsider, a burglar's tool. That is the pistol, that is the jimmy, or burglar's tool. It is used to catch a key from the outside and unlock it: that is, for pushing it through the key-hole and turning the key. The character of the instrument is for turning keys in doors, or drawers, or closets. It is used for that, either on the outside or inside of the house."

If there was no probable connection between the possession of these tools and the offence committed, then the introduction of this testimony would have been error. To this extent the cases cited by appellant in his brief clearly go. The possession of burglar's tools does not tend to connect the person having them with the commission of rape

Digitized by Google

or petty larceny. But the possession of tools which are equally adapted to the commission of burglary and the offence charged does not become unimportant merely because the tools, or some of them, are called burglar's tools, and the offence is not called burglary. It is obvious that men who set out to commit larceny by stealing from a dwelling house in the night-time, and who commit the offence by ransacking the closets and wardrobes of two stories of the dwelling whilst the family are at supper, are very probably provided with some implements which burglars use, weapons of offence and defence, such as a pistol and a billy, and instruments for turning keys, such as an outsider, which may be as necessary to commit larceny by opening an inner room as to commit burglary by opening the lock of an outside door. The implements, tools, and weapons were all of them apparently adapted to the commission of the particular offence shown, and just the implements which common sense would lead us to expect to find upon men going round in bands of three, after dark in an autumn evening, with a wagon to carry off their spoils, and with the intention of entering houses through the unfastened front door, whilst the family were at supper, and carrying off clothing and trinkets from the bed-rooms. Circumstantial evidence is proper on the hypothesis that certain things are usually concomitant of each other. The general rule undoubtedly is, as laid down in *The People* v. *Winters* (29 Cal. 658), cited by appellants, that before burglarious tools can be received in evidence, it must be shown that the burglary charged was in fact committed, that it was committed by the aid of burglarious tools like those proposed to be shown in evidence, and that the defendant was in the vicinity at the time, or about the time the offence was committed. This is on the ground that, unless a burglary has been committed, possession of tools to commit it can not be said to form links in a chain connecting defendant with the offence. But, where no burglary has been committed, but an offence has been committed for the commission of which certain

Digitized by Google

tools, also used by burglars, are appropriate, and which offence is not likely to be attempted in the manner detailed in the evidence by persons not having such tools about them at the time, and such tools, apt for the commission of the offence, are found upon persons in the vicinity under the circumstances of the present case, it would be impossible to say that the possession of such tools was not an important link in the chain of circumstantial evidence.

We think the judgment should be affirmed. It is so ordered. Judge THOMPSON does not sit. Judge LEWIS concurs.

WILLIAM GLASGOW JR., Respondent, v. LEVIN H. BAKER ET AL., Appellants.

July 3, 1883.

1. COMMON FIELD LOTS — OCCUPATION UNDER ACT OF 1812. — The act of congress of June 13, 1812, is not a mere reservation of land from future disposition, but is a grant of the lands within its descriptive terms to the persons designated.
2. —— EVIDENCE. — In order to make out a title under this act it must be shown, not only that the lot was cultivated prior to December 20, 1803, but by whom the particular common-field lot was so occupied and cultivated.
3. —— EJECTMENT — OUTSTANDING TITLE. — An outstanding title in a third person, set up as a bar to recovery in ejectment must be such a one as the owner thereof could recover on were he the plaintiff in ejectment.
4. —— The owner of an outstanding title set up as a bar in ejectment must be so identified as to enable the adverse party to dispute his title by proof of abandonment or incapacity to hold title.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

BRITTON A. HILL and ROBERT E. COLLINS, for the appellants: The common fields were a connected and continuous series of lots, *en masse*, surrounded by a common fence. — *Page* v. *Scheibel*, 11 Mo. 187; *Glasgow* v. *Hortez*, 1 Black, 595. If the whole of the township was granted or disposed

Digitized by Google

of by said act of congress, the plaintiff can not recover in this action.—*Glasgow* v. *Hortez*, 1 Black, 595; 2 How. 345, 375; *Glasgow* v. *Lindell's Heirs*, 50 Mo. 70, 81; *Glasgow* v. *Lindell's Heirs*, 72 Mo. 443. All of this township was granted and disposed of on the 13th of June, 1812, by the first and second sections of said act of congress.—*Glasgow* v. *Baker*, 72 Mo. 81, and cases cited.

M. L. GRAY, S. T. GLOVER, and JOHN D. S. DRYDEN, for the respondent: The plaintiff is entitled to maintain this suit.—Act of March 3, 1851 (Sess. Laws of 1851, p. 706); *Glasgow* v. *Baker*, 50 Mo. 78; *s. c.* 72 Mo. 443. If the United States government was the owner of the land in dispute at the time the act of 6th of March, 1820, took effect, that act in connection with the ordinance of the convention of 19th of July, 1820 had the effect to vest the title to the same in the state of Missouri.—*Payne* v. *St. Louis County*, 8 Mo. 476; *Kennett* v. *Cole County*, 13 Mo. 139; *The State* v. *Dent*, 18 Mo. 313; *The State* v. *Ham*, 19 *Id.* 592; *s. c.* 18 How. 126. The case as made by the evidence is insufficient to sustain the defence of outstanding title.—*McDonald* v. *Schneider*, 27 Mo. 402; *Greenleaf's Lessee* v. *Birth*, 6 Pet. 312; *Peck* v. *Carmichael*, 9 Yerg. 325; *Vasquez* v. *Ewing*, 42 Mo. 256–258. There is no such thing as a confirmation under the act of June 13, 1812, *en masse*, but only to known and ascertained persons, and of a definite and ascertained lot.—*Hammond* v. *Coleman*, 4 Mo. App. 315; *Guitard* v. *Stoddard*, 16 How. 493; *Glasgow* v. *Hortez*, 1 Black, 593; *Page* v. *Scheibel*, 11 Mo. 167; *Gamache* v. *Piquignot*, 17 Mo. 310; *Papin* v. *Hines*, 23 Mo. 277. The mere fact that the land in dispute lay within the exterior limits of the common fields of the Grand Prairie of St. Louis was no obstacle to the plaintiff's title attaching under the act of congress of the 6th of March, 1820, provided the disputed premises were at that time vacant land.—*Hammond* v. *Schools*, 8 Mo. 65; *Eberle* v. *Schools*, 11 *Id.* 247; *The State* v. *Ham*, 19 Mo. 592.

Digitized by Google

LEWIS, P. J., delivered the opinion of the court.

This ejectment suit has been pending ever since the year 1853, and has been twice passed upon by our supreme court. 50 Mo. 60; 72 Mo. 441. The plaintiff is the last surviving commissioner of three who were appointed under an act of the general assembly, approved March 3, 1851, to take possession of section 16, in township 45, north of range 7 east, and to sell the same, etc. Sess. Acts 1851, p. 706. The state's title under which this authority was given dates from the act of congress of March 6, 1820, admitting Missouri into the Union, and the ordinance of acceptance of July 19, 1820. This title was sustained by the circuit court, in a judgment from which the defendants have appealed.

The defendants hold that the state acquired no title to the land in controversy because, although within the sixteenth section, as granted in the act of 1820, the same land had been previously granted and confirmed to private persons by virtue of the act of congress of June 13, 1812, with the fact of occupancy and cultivation by such persons prior to December 20, 1803. The land appears to be within the boundaries of the Grand Prairie common field. The defendants undertook to show that it included the several lots of one or more by forty arpens within the common field, which were formerly occupied and cultivated respectively, by Bonis, Bacanne, Laroche, and Bizet. The trial court found against the defence presented in this form, upon issues of fact relating to boundaries and location. As the record now stands, the defence seems to be narrowed down to a general proposition, which is the only one we deem it necessary here to consider.

There was testimony tending to show that, prior to December 20, 1803, the Grand Prairie common field was composed of a connected series of long and narrow lots, adjoining each other on their longest sides, and bounded

Digitized by Google

at their ends on a continuous line, whose general direction was north and south. That all these lots were cultivated by inhabitants of St. Louis, some having one, and others two or more, each occupant holding his specific parcel separate from the others. As already mentioned it was shown and admitted that the land in dispute lies within the outer lines of the Grand Prairie common field, while it is also within the lines of surveys under the acts of congress. It is contended for the defendants that, as a proposition of law, these facts are sufficient to establish an outstanding title which will defeat the plaintiff's claim, without any proof or identification of the particular lots which the land covers, or of the person or persons who occupied or cultivated them prior to December 20, 1803.

To my mind, this proposition is at war with the ancient and familiar exactions of certainty in legal procedure which have always been considered as fundamental and indispensable. It seems to negative the axiomatic rule, that there can not exist a grant without a grantee.

It must be observed that the act of June 13, 1812, is not a mere reservation of lands from future disposition by the government. The courts have always held that it is a direct and operative grant of the lands, within its descriptive terms, to the persons respectively, whom it designates. As to any particular lot, therefore, and any person supposed to be a beneficiary of the act, if there be lacking in the relations between them any element that is essential to the constitution of a grant, it can not be found that they are within the effective operation of the act.

The reasoning which holds that, because a particular effect of the act of 1812 has been to withhold from later disposal large bodies of land within certain boundaries, therefore the act itself is to be treated as an expressed reservation of the lands found within those boundaries, is fallacious in the

Digitized by Google

extreme. It confounds an effect with the cause which induced it, or, rather it makes an effect do duty as the cause of itself. The act of 1812 uses no language of reservation in this connection. If its operation practically excepts any part of a sixteenth section from the general donation contained in the act of 1820, this is solely because such part has already been "otherwise disposed of" in the legislative grant to a cultivator or possessor who was such before December 20, 1803. The reservation, if so it must be called, first appears as a logical result of the actual grant. The *grant*, therefore, is the first thing to be proved. But the reasoning to which we demur assumes first of all a reservation in general terms, and then argues, that since there *is* a reservation, *therefore* there must have been a cultivator or possessor, to whom the lot was granted by the act of 1812; *therefore*, there need be no more specific proof of the fact; *therefore*, the lot was reserved, and did not pass by the act of 1820. This is arguing in a circle. It would prove that, while the reservation owes its existence to the grant, the grant, at the same time, owes its existence to the reservation. Such a confusion of ideas must invariably result from every attempt to show that a sixteenth section title, derived from the act of 1820, can be defeated by operation of the act of 1812, without the legal, customary, and specific proofs of a known grantee, under the latter, by virtue of inhabitation and possession before December 20, 1803. Further: it is a well established principle that an outstanding title in a third person, set up as a bar to recovery in an action of ejectment, must be such a one as the owner of that title himself could recover on, if he were asserting it in an action. It must be a present, subsisting, and operative title. *McDonald* v. *Schneider*, 27 Mo. 405. Such a title is always susceptible of direct proof, and will never be recognized upon the faith of anything less. Can there be a direct proof of title, which fails to identify the holder? Legal identification may exist in description of the

Digitized by Google

person as well as in the name. "The children of A," are descriptive words which separate the persons intended from all the rest of the world. But "The man who crossed on the bridge last Saturday," is an expression far too remote, since hundreds may have done the same act. All the books agree that a grant to "A. or B." is absolutely void. Why? It may be certain that both A. and B. are well known human entities, capable of receiving; that the grantor can at any time testify which of the two, or whether it was both, he meant to favor; and that A. and B. can at once remove all doubt, by agreeing between themselves which shall yield, or that there shall be a joint enjoyment. But for the simple reason that the law, through its courts, can not *for itself* perceive and determine who is the real grantee, the intended grant is declared a nullity. Again: a grant to the inhabitants of an unincorporated town and their successors in inhabitation, may vest a life estate in the present inhabitants, but is void as to the successors. *Thomas* v. *Marshfield*, 10 Pick. 364; *Hornbeck* v. *Westbrook*, 9 Johns. 73. The future inhabitants may be identified beyond all question, from the moment of their settlement and whenever they propose to claim the benefit of the grant. But no human perception can fix their individuality at the time when the grant is executed. Hence, there is no grant in the eye of the law.

From these distinctions it seems clearly to result that the law will recognize no grant where the individuality of the grantee is either not fixed, or is incapable of being fixed. If it is capable of being fixed, this must be done to satisfy a familiar rule, by the best evidence that the nature of the case will admit, as this rule is understood in established usage. Open physical facts which are inseparable from the thing to be proved, and without which its existence can not legally be recognized, must always distinctly appear.

How then, consistently with these requirements, must we

Digitized by Google

satisfy a court of justice that the United States, by the act of June 13, 1812 has executed a valid and effectual grant of a specific lot of land? Must we not first of all identify the grantee, and fix his individuality, either by his name or by a personal description, which will set him apart from all others? Proof that the lots here in question were cultivated by *somebody* before December 20, 1803, with nothing more, seems to stop far short of the certainty requisite to create a grant. It admits of a hypothesis that they were cultivated by dozens of persons, that some of these were never claimants, and that others abandoned their claims, if any they had; or that those who claimed and cultivated died without heirs before June 13, 1812, or were alien enemies. In these events, or any of them, there could be no grant. And yet the party claiming adversely will be absolutely cut off from either pleading or proving any one of these conditions, by the fact that no person is named or described, upon whom he might fix them. It is abhorrent to every system of enlightened jurisprudence that either pleadings or proofs, while on their face conclusive against the adversary, shall yet be so vague and indefinite, that he can not possibly strike at them, for want of a visible point of attack. To admit the defendants' doctrine in the present case, would be to cut the plaintiff off from a legitimate line of defence against the alleged outstanding title, which would be fairly open to him, if properly advised who were the supposed grantees, by name or description, under the act of 1812. The plaintiff can not be called upon to identify them, since he would first have to prove, and then to disprove their alleged character. Finally, it may be said without the least fear of contradiction, that no adjudicated case can be found, in which an outstanding title was sustained against a plaintiff in ejectment without a clear and satisfactory showing of who was the holder of such outstanding title.

Counsel say that these conclusions are opposed by two

Digitized by Google

decisions of the supreme court. We do not so understand the decisions. In neither of them is the question we have been discussing presented or considered. It requires a strained construction to discern, even in the *dicta* of the opinions, a conscious reference to the point upon which this case now turns. In the first decision (*Glasgow* v. *Lindell*, 50 Mo. 60), the point settled, which comes nearest to the matter in hand, was that evidence of cultivation and possession, under the act of 1812, was sufficient, without direct proof that the possessor had also "claimed" the land. It is further recognized as the settled law, that the act by its own terms vested in each inhabitant of St. Louis the lot cultivated by him as conditioned, and that no survey was necessary to complete the title. A single remark made in that connection goes far to overturn the defendant's present theory. Judge Adams said, of the common field lot confirmed under the act of 1812, that "it either exists upon the ground, by defined limits, or it has no existence at all." How, then, can the defendant here claim to have shown such a confirmation, upon a theory which repudiates all need of establishing the "defined limits of any lot which is supposed to interfere with the plaintiff's claim?" One or more of the defendant's instructions, which had been refused on that occasion, were substantially reproduced, and again refused, at the last trial. Judge Adams remarked, in his opinion: "In regard to the instructions prayed for by the defendants and refused by the court, I can see no substantial objections to them except to the two instructions marked A. and E." Even if the instructions were still free from objection it would not necessarily follow that the judgment must be reversed because they were refused. They must be considered, as to the first trial, with reference to the form of defence which was then being urged, and the plaintiff's objections thereto, which were overruled by the court. They

Digitized by Google

formed part of a series, which taken together, presented the specific questions to which the attention of the court was directed. The matter of inquiry is clearly shown in the language of the opinion: "The objection that the defendant's instructions embraced confirmations *en masse* is a criticism upon the language of the instructions, rather than a substantial objection. The instructions, in my opinion, do not bear that construction. They were intended to enunciate the proposition that each inhabitant of the town of St. Louis, cultivating or possessing a common field lot prior to the 20th of December, 1803, was confirmed in his title to such lot by the act of congress of the 13th of June, 1812. The defendants had a right in their defence to invoke these outstanding titles to defeat the plaintiff's action. The titles so emanating by act of congress of the 13th of June, 1812, or emanating by act of congress of April, 1816, were older and better titles than the title of the state to section sixteen, which was granted in 1820." All this is undoubtedly true, and is perfectly consistent with the views contained in the present opinion. While upholding, as we do, the efficacy of the common field lot confirmation, Judge Adams makes no reference to the method of proving it, other than in his allusion to "confirmations *en masse*." He answers objections by saying that the instructions do not mean to sustain such wholesale confirmations. This seems to be a pretty strong intimation that, if the instructions did sustain them, they would be erroneous; and that is precisely what we here hold. In the last trial, the defendant's instructions were so framed as to assume that the field lot confirmation, in any instance, might be *sufficiently proved*, by showing the so-called confirmation *en masse* of all the lots in the Grand Prairie. We hold, simply, that such a mode of proof is insufficient. Judge Adams, when fairly understood, seems to have been of the same opinion.

Digitized by Google

In the second decision (*Glasgow* v. *Baker*, 72 Mo. 441), the question determined was as to the effect of a survey in partition, in creating an estoppel against the parties, in favor of a stranger to the proceeding. Judge Napton, delivering the opinion, remarks upon the common understanding as resulting from numerous judicial investigations, that all the lots in the common fields were cultivated by some persons who thereby got the benefit of the act of 1812 in a confirmation to themselves. He treats the subject in general terms, and says nothing, as he has no occasion to say any thing, about the requisite particulars of legal proof in a judicial proceeding, upon an issue raised as to the fact of cultivation and consequent confirmation of a particular lot. It does not appear that the sufficiency of technical proof, as here insisted on for the defendants, was at all in the mind of the court. It is as if a certain corporate body had figured in ninety-nine different suits, in every one of which its character as a corporation was distinctly proved. A court might well, in such a case, remark upon the well known and familiar fact that the body had been duly incorporated. And yet no one will deny that, in the hundredth case, upon the raising of such an issue between new parties, it would be quite as necessary as ever before, to prove the fact of incorporation by competent and lawful testimony.

We require nothing more than the application of a similar rule to the present case, and do not think that this is denied by any ruling of our supreme court. The judgment of the circuit court will be affirmed. Judge BAKEWELL concurs. Judge THOMPSON files a dissenting opinion.

Dissenting opinion by THOMPSON, J.

I can not agree to the opinion of the court in this case, for the reasons stated in my opinion in *Cummings* v. *Jamison* (No. 2095). My understanding of the decisions of the

supreme court, in the two former appeals of this case (50 Mo. 60; 72 *Mo.* 441), as applied to the facts then and now in evidence is that the Grand Prairie common fields of St. Louis was *one* field, under one enclosure, though owned and cultivated in severalty by various persons; that the effect of the act of 1812, was to recognize and confirm the title of these various occupiers and cultivators, as they existed on the 20th day of December, 1803, and to withdraw this entire field from future disposition as a part of the public domain; that the effect of this act was to *dispose of* all the lands within the boundaries of this one field, within the terms of the act of 1820, which granted the sixteenth section in every township to the state of Missouri for the use of public schools; that as the effect of the act of 1812 was to remove the entire body of land known as the Grand Prairie common fields from disposition thereafter as a part of the public domain, the plaintiffs took nothing by virtue of the act of 1820, within the out boundary line of those fields. To my mind it makes no difference that some of the ancient occupiers of those fields or their heirs have never appeared to claim the lands which belonged to them and which were confirmed to them by the act of 1812. To my mind the question does not stand so much upon the doctrine of outstanding title as upon the ground that nothing was ever granted to these plaintiffs within the boundary line of these common fields. I have the satisfaction of knowing that if I have misunderstood the decisions of the supreme court, that tribunal may have the opportunity, upon an appeal from the decision of this court, of saying what it really did mean. The rule which I deduce from those decisions is commended by strong reasons of public policy. It saves the rights of occupiers who, by themselves and those through whom they claim, have held these lands for two or three generations.

Digitized by Google

Digitized by Google

CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS,

OCTOBER TERM, 1883.

In re Caroline C. Nitsche.

October 5, 1883.

1. **Notary Public — Witnesses — Deposition — Contempt. — A commitment of a witness for a refusal to testify, issued by a notary public who has no power to take the testimony, is void.**
2. **—— Jurisdiction. — A notary public has no power to take depositions in a proceeding pending in another State until he has received a *dedimus* from such other State.**
3. **—— Parties to the suit can not by consent confer such jurisdiction.**

Application for writ of *habeas corpus*.
Prisoner discharged.

Lewis, P. J., in chambers, delivered the opinion.

Revised Statutes, section 2150, provides: "Every person, judge, or other officer of the state required to take the depositions or examination of witnesses in pursuance of this chapter, or by virtue of any commission issuing out of any court of record in this or any other government, shall have power to issue subpœnas for witnesses to appear and testify, and to compel their attendance, in the same manner and under like penalties as any court of record of this state. Any person summoned as a witness in virtue of the

Digitized by Google

provisions of this chapter, and attending, who shall refuse to give evidence which may be lawfully required to be given by him, on oath or affirmation, may be committed to prison by the officer or person authorized to take his deposition, or testimony," etc.

This is the only provision in the laws of Missouri whereby a witness may be compelled to give his testimony for a cause pending in another state. The statutes which authorize the taking of depositions without a commission, do not apply to such causes.

It appears that the cause for which the testimony of the prisoner was required by the plaintiff therein, is pending in the superior court of Cook County, in the state of Illinois. On September 27, 1883, a commission, or *dedimus potestatem*, in customary form, was issued by the clerk of that court and directed to the notary in St. Louis, under whose commitment the prisoner is held. It was agreed by counsel for the parties to the suit that the taking of depositions should be begun at 2 o'clock P. M. of the same day. The witness — the present petitioner—was subpœnaed, but failed to appear. She was brought by attachment before the notary on the the 28th, and thereupon refused to be sworn, or to give her testimony. The notary, on the same day, issued the commitment, by virtue whereof the petitioner was arrested, and is now held in custody by the sheriff. It further appears, that when the commitment was issued, the notary and the counsel in St. Louis had been informed, through a telegraphie dispatch, of the issuing of the *dedimus*, and of its being forwarded by mail. But the paper had not been received by the notary, and did not, in fact, reach him until on the 29th day of September, one day after the commitment and arrest.

In such a state of facts, the notary had no shadow of authority to detain the petitioner, or to compel her to testify. The parties to the cause could not, by agreement between themselves, dispose of the petitioner's personal

Digitized by Google

liberty, or confer upon the officer a jurisdiction so to do, without any warrant of law. The notary could have no power in the premises, except such as might be conferred upon him by the commission, and the commission could confer nothing until it reached the officer in whom it was to vitalize the power.

In a free government every presumption must be against a power to detain the person of the citizen. The notary had no right to assume that the telegram was true; or that the commission was in due form; or that it bore the seal of a court of record; or that it would not be lost on the way, or would ever reach him at all. To suppose that he might lawfully anticipate all or any of these things, is as unreasonable as it would be to say that an appointive officer, of any sort, may properly exercise all the powers and functions of his supposed office before receiving the appointment or commission, because he expects to get one at some future day. There is here no analogy with the case, as suggested by counsel, of a judgment, injunction, or order of court, whereof notice is imparted by the entry of record; so that parties must refrain from violating its terms, without waiting for legal service. There, a party is held to the knowledge of an existing fact, which it is his duty to know. Here, the law simply forbids an officer to assume the existence of a fact, until the proper evidence thereof appears before him. Any reasoning in support of the notary's act, in this instance, would answer quite as well for a sheriff who, upon information that a sentence of death had been pronounced, should proceed to hang the criminal without a warrant of execution. I am of the opinion that the commitment in this case was void, and that the petitioner must be discharged from custody.

Digitized by Google

14a 216
97 281

City of St. Louis, Appellant, v. Waterloo-Carondelet Turnpike and Ferry Company, Respondent.

October 23, 1883.

1. Constitutional Law — Municipal Ordinances — Ferries. — An ordinance passed in pursuance of provisions of a municipal charter which authorizes the licensing of ferries within the city, does not violate the constitutional inhibition against the passage, by the legislature, of local or special laws.
2. —— An ordinance fixing a penalty for operating a ferry within the city limits, passed in pursuance of charter provisions, may be enforced, though the ordinance contains special provisions applicable only to a particular ferry.
3. —— The right to establish ferries is within the control of the state, and is not included in the power of the federal government to regulate commerce between the states, although the ferry crosses a river which divides two states.

Appeal from the St. Louis Court of Criminal Correction, Cady, J.

Reversed and judgment.

Leverett Bell and Samuel Erskine, for the appellant: The city charter of St. Louis authorizes the mayor and assembly by ordinance to regulate and license all ferries into, or out of, or within the harbor, and to establish ferry rates. — 2 Rev. Stat., p. 1585, sect. 26, par. 4. This is a valid grant of power. — *Chilvers* v. *The People*, 11 Mich. 43; *The People* v. *Mayor*, 32 Barb. 102; *Fanning* v. *Gregoire*, 57 U. S. 524; *Conway* v. *Taylor*, 66 U. S. 603; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill. 560.

McKeighan & Jones and T. J. Portis, for the respondent: Whatever the people, by the state constitution, have forbidden the state government from doing, it can not indirectly do through the local goverments. — *Illinois College* v. *Cooper*, 25 Ill. 148; *Davenport* v. *Davenport*, 13 Iowa, 229; *Saving Society* v. *Philadelphia*, 31 Pa. St. 175.

Digitized by Google

A municipality may charge a reasonable compensation for the use of any improvement, or conveniences furnished and owned by it on wharf landings, but that this right must be carefully restricted to such rental charge, and must not pass this legitimate purpose. — *Packet Co.* v. *Keokuk*, 5 Otto, 80; *Packet Co.* v. *St. Louis*, 10 Otto, 423; *Cameron* v. *New Orleans*, 20 Wall. 577; *Steamboat Co.* v. *Port Wardens*, 6 Wall. 31; *Peete* v. *Morgan*, 19 Wall. 581. A license fee, which is for revenue purposes, is a tax. When a license fee exceeds a reasonable compensation for the mere issuing of the license, as a municipal regulation under the police power, it becomes a tax, although the phraseology of a license may be retained. Cooley Const. Lim., 201; *Brown* v. *Maryland*, 12 Wall. 554; *Ward* v. *Maryland*, 18 Wall. 420.

Lewis, P. J., delivered the opinion of the court.

This is a proceeding against the defendant for keeping a ferry, without a license, within the limits of the city of St. Louis. The court of criminal correction gave judgment for the defendant. The first section of ordinance 10,414, as amended by ordinance 11,239, adopted by the municipal assembly of the city of St. Louis, prohibits the keeping of a ferry within the limits of the city, without a license therefor, "under a penalty of thirty dollars for each day such ferry may be kept without a license." The evidence was ample to sustain the complaint, and, if the ordinance is valid, there seems to be no reason why the plaintiff should not have recovered.

The twenty-fourth section of the ordinance makes some special provisions applicable only to the licensing of the present defendant to keep a ferry. The bulk of the argument here for the defendant is directed against the constitutional validity of this section. As the plaintiff's claim is made under the first section, and is not, in any manner

Digitized by Google

affected by the provisions of the twenty-fourth, so much of the discussion appears to be a waste of time. The validity or invalidity of the twenty-fourth section has nothing to do with the plaintiff's right of recovery under the first. The provisions of the ordinance are easily severable and full effect must be given to at least so many of them as are unimpeachable.

The municipal assembly of St. Louis, although in its forms of procedure, and in its making of certain general regulations for the government of the city's inhabitants, it has characteristics of a legislative body, yet, in its relation to the state constitution, it is in no sense a part or branch of that one of the three divisions of government which, in the distribution of powers, is designated as the legislative department. In that relation it is purely ministerial, or executive, putting into specific effect, within a limited territory, the general purposes of constitutional and statutory rules of action. Where the General Assembly of the state can operate upon particular objects, only through general laws, the municipal assembly of St. Louis necessarily, and by the plain terms of the charter, acts directly upon the object itself. By ordinance, it opens, vacates, alters, or improves a street, under its special name or description; constructs a sewer in a particular locality, and regulates its use; erects a wharf or dock, and establishes a market place, or a public park. In many other ways it does and must do, what the General Assembly could not do without violating the constitutional inhibitions against special legislation. All is done by express authority of the city charter, whose constitutionality in that regard has never been questioned. Rev. Stats. p. 1585. The same authority permits the local body "to regulate and license all ferries, * * * to sell ferry privileges within the city limits, and to establish ferry rates." How could it license a ferry, or sell a ferry privilege "by ordi-

Digitized by Google

nance," without acting directly upon the subject of the proceeding?

In the face of these simple truths, it is here insisted that, when the constitution commands the General Assembly to pass no local or special law, the municipal assembly of St. Louis must obey. In other words, wherever the organic law treats of the legislative department of the state government, it means to include all municipal the assemblies, town councils, and boards of trustees, of all the cities and towns in the state. Hence, the ordinance before us is void as an attempt at local and special legislation. There is nothing in the argument. It would have no weight against the provisions of the twenty-fourth section, above referred to. Still less can it be heard against the first section, which makes a general provision against all ferries doing business without a license.

It is further urged for the defendant that the ordinance violates section 10, subdivision 2, of article I., of the federal constitution, which declares that "no state shall * * * lay any imposts or duties on imports or exports," and that "no state shall * * * lay any duty on tonnage," etc. Counsel cite a number of cases in which wharfage dues and other fees were assessed against steamboats and other vessels for the privilege of landing at state ports, and these charges were held to be in contravention of the provisions quoted. Neither the constitutional provisions, nor the authorities have any relevancy to the present case. The distinction between a law which hinders or imposes burdens on an existing commerce between the states, or between a state and foreign nations, and a law which prescribes conditions for establishing and carrying on the business of ferrying within or upon the borders of a state, is too obvious for discussion. A ferry privilege is a privilege of highway. As such, and as comprehended in the police power, it is within the sovereign control of the state; belonging to those rights and powers which were never surrendered in the federal com-

Digitized by Google

pact. In *Conway* v. *Taylor* (66 U. S. 603), it was held by the United States supreme court, that "the authority to establish and regulate ferries is not included in the power of the federal government to 'regulate commerce with foreign nations and among the several states and with the Indian tribes.' The authority to regulate ferries has never been claimed by the general government, has always been exercised by the states, never by congress, and is undoubtedly a part of the immense mass of undelegated powers reserved to the states respectively." In the same decision it was held that the case was not altered by the fact that the course of the ferry was from one state to another across the Ohio River. Each state controlled the ferry as to its own landing. "A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another." Such has always been the well understood doctrine of state control, and no authority to the contrary can be found. Counsel suggest that, in the case referred to, "no duty, tax, or impost was levied on the grantee or licensee of the franchise, as a condition of the franchise or license." The report does not sustain the suggestion. But, if it did, it would not affect the question. The power recognized in the state is one of absolute control, without any limitation of terms or conditions upon its exercise. A right to license implies a right to prohibit. And a right to prohibit necessarily includes the right to impose conditions upon a grant of the franchise.

The case for the city was fully made out, and no reason is shown why a judgment should not have been rendered in its favor. The judgment is reversed, and a judgment will be entered here in favor of the plaintiff, for the amount claimed in the complaint. All the judges concur.

Digitized by Google

14 221
105m 590
14 221
57 515

CITY OF ST. LOUIS, Appellant, v. ST. LOUIS RAILROAD COMPANY, Respondent.

October 23, 1883.

1. CONSTITUTIONAL LAW — ORDINANCES. — Where the provisions of an ordinance are separable the whole will not be declared void because of the unconstitutionality of a part.

2. —— A municipal regulation requiring street railroads to make quarterly reports of the number of passengers carried is not void as being unreasonable or in restraint of trade, and does not violate article V. of the amendments to the constitution of the United States.

APPEAL from the St. Louis Court of Criminal Correction, NOONAN, J.

Reversed and judgment.

LEVERETT BELL and ASHLEY C. CLOVER, for the appellant.

SMITH P. GALT, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff complained in the first district police court of St. Louis, against the defendant, a street railway corporation, for having failed and refused, between the first and fifteenth days of July, 1882, to report to the city register a written statement under oath of the number of trips made by the cars of defendant, during three months, ending on the last day of June, 1882, and for having failed and refused, between the same dates, to report in like manner and to the same officer, the number of passengers carried by the defendant's cars during the same three months. The police court found the defendant guilty, and assessed a fine in the plaintiff's favor of $500. On an appeal to the court of criminal correction, judgment was given for the defendant.

The complaint was founded on section 11, of article IV., chapter 31, of the Revised Ordinances of the city of St.

Digitized by Google

Louis, approved March 29, 1881, which reads as follows: —

"SEC. 11. It shall be the duty of each of the street railroad companies in the city of St. Louis, to report, under oath, to the city register, between the first and fifteenth days of the months of July, October, January and April of each year, by their president, secretary, or superintendent, the number of trips made and passengers carried over the road of which the person making the report is an officer, during the preceding three months, ending on the last day of the months of June, September, December, and March; and any failure to make the report required by this section shall subject the street railroad company so offending to a fine of not less than $500. It shall be the duty of the city register, if said reports show that any of said companies have carried an average of over eighteen persons per trip to each car, since their last previous return, to report such company to any of the police justices, and such company shall be subject to a fine of not less than $300 for the first offence, and a fine of not less than $500 for each subsequent offence."

The cause was submitted in the court below upon an agreed statement of facts, which included an account of the number of cars and trips run, and passengers carried during the quarter year mentioned in the complaint, together with an admission that the defendant had failed and refused to make the reports as charged.

It is urged against the validity of the section of the ordinance above quoted, that it is repugnant to article V. of the amendments to the constitution of the United States, and to the twenty-third section of article XII. of the constitution of Missouri; that it is unauthorized by the city charter; that it is unreasonable, oppressive, and in restraint of trade. All the objections presented under these several heads are directed exclusively against that part of the section which provides for the imposition of a penalty for

Digitized by Google

carrying more than a prescribed average number of passengers per trip, upon a report from the city register, to be based upon the reports furnished to him by the railway companies. It is claimed that this provision and the others in the section are so mutually connected with and dependent upon each other, as not to be severable, and that all must stand or fall together. It is obvious that upon this last proposition depends the pertinence of all the objections raised against the ordinance. If that part of the ordinance which is here sought to, be enforced is severable from the rest, and contains within itself a complete enactment, having a distinct purpose, which may be carried into effect without any aid from the objectionable provisions, then it must stand upon its own merits, and can suffer no taint from a mere association in the same instrument with such provisions, however indefensible these may be.

Let it be conceded, for the purposes of this case, that the city authorities had no right or power whatever to limit the railway companies to an average of eighteen persons per trip, to each car, or to impose any penalty upon them for exceeding that number. It will result that the command to that effect is a nullity and that a railway company in disregarding it would be guilty of no offence. As there is no attempt in this proceeding to enforce that command, its inherent insufficiency has no possible relation here to any legitimate defence. The first member of the section, which this proceeding seeks to enforce, can only suffer from the infirmity of the second, if it is so connected with, dependent upon, or identified with the latter that it can not be put into operation, as intended, without introducing the evils of the other provision. But the only discernible connection between the two appears in the fact that, if the first is obeyed, it may be the means of furnishing evidence to sustain a charge made under the second. So that, according to the defendant's position, the first provision must be annulled, because its enforcement might contribute proof of that which would be

Digitized by Google

no crime, and on account of which no sort of liability could ever arise. The objection is too trivial for serious consideration. It is perfectly clear that the first member of the section may be enforced and obeyed in its entire extent, without any aid from the second, and even if the second be declared null and void, or — which is the same thing — had never been enacted.

The St. Louis city charter authorizes the municipal assembly, by ordinance, "to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a *per capita* tax on the passengers transported," etc. Rev. Stat., p. 1616, sect. 1. In *St. Louis R. Co.* v. *South St. Louis R. Co.* (72 Mo. 67), the supreme court held, in effect, that this grant of power was valid and might be carried into effect by an ordinance not inconsistent with the act approved January 16, 1860. Sess. Acts 1859–60, p. 516. No inconsistency with that act is shown in the ordinance provision upon which this suit is founded. The regulation requiring periodical reports of the number of trips made, and passengers carried, is obviously within an authority to regulate and control the railroads after their completion. It provides, in the most reasonable and proper way, for the obtaining of that sort of information which is unquestionably essential to a wise and prudent "regulation and control" — to say nothing of its manifest fitness in the event of an authorized imposition of a "*per capita* tax on the passengers transported." The defendant does not attempt to show that this regulation is in itself repugnant to any law or rule, constitutional or otherwise, of controlling authority over the acts of the municipal assembly.

Digitized by Google

Counsel for the defendant appropriately quotes the language of Chief Justice Waite, in *Allen* v. *Louisiana* (103 U. S. 83): "It is an elementary principle that the same statute may be in part constitutional, and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Aldermen of Charlestown* (2 Gray (Mass.), 84), 'if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." These satisfactory tests are conclusive against all the positions here taken for the defendant. It is useless to pretend that the provision for quarterly reports of trips and passengers is so connected with or dependent upon that limiting the number of passengers, that it could not be carried into effect without the latter. No rational mind can suppose that, if the regulation limiting the number of passengers per trip were stricken out, the municipal assembly would not have passed the provision for quarterly reports, or that it would be impossible to give effect to the legislative intent in securing statistical information from time to time, touching the business of the railroads, without also making it penal to carry more than a certain number of passengers per trip. The second provision in the section may be, for certain purposes of evidence, depend-

Digitized by Google

ent on the operation of the first. But that does not constitute a mutual dependence — the first being as complete within itself as if it stood alone, and as if the other had not been passed, or had been made a separate ordinance.

We are not to be understood as holding, in this opinion, that the second part of the ordinance section, above considered, is void. We have merely undertaken to show that if it were so, the fact would have no influence in this case. But if we felt called upon to declare that a limitation upon the number of passengers to be carried by each street car would be a legitimate exercise of the "police power to regulate," as conferred upon the municipal assembly, we might still find a fatal objection possible, on grounds of unreasonableness, oppression, or improper restraint of trade, in its application to a particular state of facts.

The judgment below was manifestly wrong. The agreed case shows that another trial would avail nothing for the defendant. The judgment is reversed, and judgment will be entered here for the amount of the fine fixed by the ordinance. All the judges concur.

14	226
64	414
14	226
90	240

State of Missouri, Respondent, *v.* Joseph Ruth, Appellant.

October 23, 1883.

1. **Venue.**—The question of venue in a criminal case is to be proved as any other fact.
2. **—— Evidence.**—The venue being laid in St. Louis, proof that the crime was committed on a certain street is sufficient to support a finding that the offence was committed in St. Louis.

Appeal from the St. Louis Court of Criminal Correction, Cady, J.

Affirmed.

Digitized by Google

J. G. LODGE, for the appellant.
M. W. HOGAN, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The defendant was convicted of petit larceny in the St. Louis Court of Criminal Correction. The information charges defendant with stealing a coat worth $25, and alleges that the offence was committed in the city of St. Louis. There was testimony tending to show that on the day named in the information, the prosecuting witness hung his coat on the rack in the hall of his boarding house, No. 1203 Washington Avenue, when he went to supper; that, when he came out from supper, the coat was gone; that the prosecuting witness, at half-past seven of the same evening, saw defendant in a second-hand shop on Christy Avenue, between Seventh and Eighth Streets, with the coat in his hand; that defendant ran away, and threw down the coat in his flight, having escaped from the prosecuting witness, who attempted to arrest him. The cause was tried by the court, which found defendant guilty of the charge.

The venue is laid in the city of St. Louis, and it is contended that there is no testimony tending to prove the venue, or that the offence was committed within the jurisdiction of the court.

It is true that no witness says in so many words that the offence was committed in the city of St. Louis. But this is not necessary. It is enough if the testimony was such as ought to have satisfied the trier of the fact that the place of the offence was that laid in the information. *The State* v. *McGinniss*, 74 Mo. 245; *The State* v. *West*, 69 Mo. 404. The case is not like *The State* v. *McGinniss* (*supra*), where the evidence was that the prosecuting witness lived in Clay County at the date of the trial, but there was nothing to show that he lived there at the date of the burglary, the venue being laid

Digitized by Google

in Clay County, and the offence charged being a burglary at the house of the witness. The case rather resembles *The State* v. *Burns* (48 Mo. 438). The supreme court in that case sustained a conviction for murder in the first degree. The venue was laid in St. Louis County. The testimony was, that the homicide was committed on Mullanphy Street, but it was no where said that Mullanphy Street was in the city or in the county of St. Louis. A diagram of the locality was introduced, but it does not appear that that was marked as being in the city of St. Louis. In that case, as in the case at bar, it was rather taken for granted than shown by direct evidence, that the street of the offence was a street of the city in which the accused was tried. In neither case could there be any doubt on the minds of the triers of the fact, or of the judges of the appellate court that the streets spoken of by the witnesses were St. Louis streets. We will not take judicial notice of all the streets of the city in which this court holds its sessions. But we need have no difficulty in judicially recognizing the fact that Washington Avenue, Morgan Street and Christy Avenue are old, established, and well known streets of St. Louis, — the city in which we sit as a court, — and that this knowledge prevails generally throughout the city, and must have been possessed by the trier of the fact in the present case. There can be no doubt from the evidence that the offence spoken of by the witnesses is spoken of as having been committed in the city of St. Louis, though they do not expressly name the town.

We have read through the testimony, and are of opinion that it warrants the conviction.

Our attention is called to nothing in the record that warrants a reversal of the judgment. It is therefore affirmed, with the concurrence of all the judges.

Digitized by Google

GEORGE D. HARRIS, Plaintiff in Error, *v.* JOHN T. BURNS ET AL., Defendants in Error.

October 23, 1883.

DEBTOR AND CREDITOR — MORTGAGES — REDEMPTION — EQUITY. — A creditor at large can not redeem his debtor's mortgaged land situated in another state, in a proceeding in which the debtor is not served with process.

ERROR to the St. Louis Circuit Court, WICKHAM, J. *Affirmed.*

JOHN D. POPE, for the plaintiff in error: Although a creditor at large, who has commenced suit by attachment and levied on goods and chattels of his debtor, can not, before judgment has been obtained, have equitable relief as to fraudulent judgments against his debtor, or restrain the transfer of his property, as was held in *Martin* v. *Michaels* (23 Mo. 50); nor redeem land within the state from a mortgage executed by his debtor, as was held in *Fisher* v. *Tallman* (74 Mo. 39)—for the obvious reason that there is a legal remedy which has not been exhausted — yet after the equity of redemption has been acquired, a bill to redeem will lie. — *Perrine* v. *Poulson*, 53 Mo. 309; *Matson* v. *Capelle*, *Id.* 235. And it is as clear that to reach an equity of redemption in lands situated without the state, or to have a deed absolute on its face declared to be a mortgage, resort must be had to a court of equity. If an account must be taken to show whether the loan has been repaid the remedy is likewise in equity. — *Worley* v. *Dryden*, 57 Mo. 226; *O'Neill* v. *Capelle*, 62 *Id.* 202.

JOHN J. CHANDLER, for the defendant in error: No person can, in equity, redeem a mortgage but he who is entitled to the estate of the mortgageor, or has a subsisting interest under him. A general creditor has no such interest. — *Martin* v. *Mitchell*, 23 Mo. 50; *Fischer* v. *Tallman*, 74 Mo. 39; *Himey* v. *Thomas*, 36 Mo. 378; *Merry* v.

Digitized by Google

Freeman, 44 Mo. 520; 2 Story Eq. Jur., sect. 1023; 4 Kent. Com. 162, 167; 1 Hilliard Real Prop. 397.

BAKEWELL, J., delivered the opinion of the court.

The petition alleges that defendant, Burns, as a member of the firm of Cherry & Co., is indebted to plaintiff in the sum of $13,400, for work and labor done, and in the sum of $5,600 for profits on work and labor which Cherry & Co. refused to allow plaintiff to perform, under a certain contract for grading a projected railroad in Georgia; that the firm of Cherry & Co. is insolvent, and its members are non-residents of Missouri; that Burns and one Smith owned sixty-five thousand acres of land in Arkansas, worth $200,000; that Burns & Smith, after the indebtedness of Burns to plaintiffs aforesaid, borrowed of defendants, Matthews & Whittaker, $32,000, for which they delivered their notes bearing ten per cent interest, and maturing in one, two, three, four, and five years from the 13th of September, 1875, secured by deed of trust upon the lands aforesaid; that Burns & Smith also delivered to Matthews & Whittaker real estate notes worth $8,000, as collateral security for this loan; that Smith then sold to Burns all his interest in this land and these collaterals; that Burns paid the first semi-annual instalment of interest to Matthews & Whittaker, and being in great pecuniary distress, was unable to pay any more; that Matthews & Whittaker threatened to foreclose, unless Burns would make prompt payment, or surrender his equity of redemption and all claim to the collaterals; that Matthews & Whittaker also demanded that Burns should convey to them eleven thousand acres of land in Arkansas, not embraced in the mortgage, and worth $15,000 and also a farm in Georgia worth $15,000; that Burns, being in great distress, yielded to these demands, and on June 3, 1876, Burns & Smith executed quit-claim deeds to Matthews & Whittaker for all these Arkansas lands, and their wives joined for the purpose of releasing dower; that Matthews & Whittaker claim that they thereby became owners,

Digitized by Google

as well of the collaterals aforesaid, as of said seventy-six thousand acres of Arkansas lands; but that said transfers, deeds, and agreements were ineffectual as a surrender of the rights of Burns, or his creditors, to the surplus of said property after paying said loan with interest and costs, and are ineffectual as against plaintiff, because the lands and notes were worth largely more than the loan and interest, because Burns was embarrassed and advantage taken of his necessities to force hard terms on him, and because Burns & Smith were not absolutely released from liability on said loan, and were not promised any release therefrom, nor was any consideration given to either of them for said surrender, but they were only promised indulgence for an indefinite time; that Burns has removed from Missouri, and has no property within the reach of process, and that plaintiff can not secure payment of the debt due from Burns to him, unless the same is paid out of the proceeds of the property conveyed to Matthews & Whittaker; but, if those lands are sold on the most advantageous terms, and the collaterals collected, and the proceeds applied, there will remain a large surplus from which plaintiff may be paid.

The lands are then described in full. Plaintiff further states that since said Burns & Smith executed the quit-claim deeds to the lands as aforesaid, said Matthews & Whittaker still hold them liable on their said notes, and have required them to insure their lives as security for the notes; that said quit-claim deeds were not designed by said Burns to be an absolute relinquishment of his equity of redemption in said lands, but were intended by him only to vest the legal title to said lands in said Matthews & Whittaker as better security for said loans as to facilitate the sale of said lands in small parcels to actual settlers, and as better terms than could have been obtained had said lands been sold under said deed of trust; that, in pursuance of a secret understanding between said Burns and said

Digitized by Google

Matthews & Whittaker, said Matthews & Whittaker have since said quit-claim, continued to sell said lands in small parcels, at remunerative prices, and have received cash and notes for said sales; that Matthews & Whittaker have sold of these lands more than enough to repay their loan, and have in their hands cash and notes, the proceeds of these sales, which ought to be applied to pay the general creditors of Burns.

Plaintiffs say that they file their petition as well for themselves as for the general creditors of Burns. The prayer is for judgment against Burns for the amount due by him to plaintiffs; that Matthews & Whittaker be decreed to hold the lands, and their proceeds, and the collateral notes, in trust to pay plaintiff's demands; for an accounting, and for leave to redeem, and for general relief.

To this bill, Matthews & Whittaker (who alone were served) interposed a demurrer, on which final judgment was rendered in their favor.

The plaintiff is not a judgment-creditor of Burns. Not only is he not a judgment-creditor, but he does not seem likely to become so without a troublesome litigation, in which a jury would probably be required, and in which Burns would certainly be entitled to demand a jury, to pass upon the question as to whether Burns owes plaintiff anything, and, if so, how much, on account of the railroad contracts. Burns was not served with process; nor had he any notice of this proceeding, actual or constructive. The land in question is not within the jurisdiction of the court. Plaintiff has no interest in the land as legal owner, nor has he a lien upon it. Having no estate or interest in the land he could not redeem the land, even if situated within this state, from a mortgage executed by his debtor. Nor is this difficulty removed by the allegation of the quit-claim deeds to the mortgage, because the theory of the plaintiff is, that those deeds, absolute on their face, are, in reality, mere mortgages.

Digitized by Google

To grant the relief asked by plaintiff would be to stretch very far anything that has ever been said, or held, in Missouri, or elsewhere, as to the power of courts of equity in certain cases to entertain a bill by a creditor at large to reach equitable assets of the debtor.

We do not at all deny that, "as to lands lying in a foreign jurisdiction, courts of equity will enforce natural equities, and compel the specific performance of contracts if the parties are within its jurisdiction." Perry on Trusts, sect. 71. And, on a proper showing, we might compel a defendant here to make a deed to lands in Arkansas. But the bill before us makes no such showing; and we can hardly place in a stronger light the difficulties which beset the theories on which it is framed than by looking at the matter in what may be taken as the standpoint of the nominal defendant, Burns. If the prayer should be granted and a decree made as asked, what would be the opinion of that defendant as to a system of jurisprudence which in a proceeding to which he is not made a party except by naming him in the title to the suit, without any notice to him, actual or constructive, should determine that he owes several thousand dollars on account of matters growing out of a railroad contract, and then adjust for him complicated money transactions with a third person, open for him transactions which, so far as he can do so, he has closed, and make him, perhaps against his will, a mortgageor of real estate lying out of the jurisdiction, of which he has conveyed the equity of redemption to the mortgagee.

If there are any assets belonging to Burns in this jurisdiction, if Matthews & Whittaker owe him anything, as is alleged, and if he is indebted to plaintiff, and is a non-resident, it would seem that the obvious legal remedy would be to begin suit by attachment, on the ground of non-residence, against Burns by publication, and to summon Matthews & Whittaker as garnishees in that proceeding, and attach the notes and other assets of Burns in their hands.

Digitized by Google

We think the circuit court properly sustained the demurrer to the bill, and, with the concurrence of all the judges, its judgment will be affirmed.

14 234
52 166

EDWARD C. ELIOT, Respondent, *v.* MERCHANTS' EXCHANGE ET AL., Appellants.

October 23, 1883.

1. EQUITY—CREDITOR'S BILL.—Certificates of membership in the Merchants' Exchange of St. Louis are property, and (subject to the rules of the Exchange) are liable for the debts of the owner, and may, by creditor's bill, be subjected to the payment of a judgment-creditor.
2. —— INJUNCTION—EXECUTION.—A debtor member of the Exchange may in a proceeding in which he and the Exchange are joined, be restrained from disposing of his certificate of membership, and may be compelled to transfer the certificate to such purchaser at sheriff's sale as possesses the qualifications of membership in the Exchange.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

OVERALL & JUDSON, and BROADHEAD & HAEUSSLER, for the appellants: A membership in the Merchants' Exchange is not property.—*In re Sutherland*, 6 Biss. 576; *Thompson* v. *Adams*, 93 Pa. St. 55; *Pancoast* v. *Cowen*, 93 Pa. St. 66. And can not be subjected to the payment of a creditor by a creditor's bill.—*Show* v. *Aveline*, 5 Ind. 384; *Stewart* v. *English*, 6 Ind. 176.

EDWARD C. ELIOT, *pro se*, GEO. W. TAUSSIG, and DAVID GOLDSMITH, for the respondent: The right of membership in the Merchants' Exchange of St. Louis is a "right of property," and is "property."—*Powell* v. *Waldron*, 26 Alb. L. J. 32; *Hyde* v. *Woods*, 94 U. S. 523; *In re Ketchum*, 1 Fed. Rep. 840; *Smith* v. *Barclay*, 21 Am. L. Reg. 408; *Ritterband* v. *Bagget*, 4 Abb. (N. C.) 67. The right

Digitized by Google

of membership in the Exchange, although a "right of property" and "property" is not subject to execution, attachment, or garnishment, in an action at law. — *Thompson* v. *Adams*, 93 Pa. St. 55; *Pancoast* v. *Gowen*, *Id.* 66. But, like a right to letters-patent, can be reached only by process of a court of equity, after all legal remedies have been exhausted. — *Ager* v. *Murray*, 105 U. S. 126; Dos Passos on Stockbrokers, 87, etc., and cases cited. And equity will aid the creditor in reaching the property of the debtor and furnish the remedy when the strict rules of legal practice fail, without showing fraud or "any other recognized ground of equitable jurisdiction." — *Pendleton* v. *Perkins*, 49 Mo. 565; *Turner* v. *Murray*, 46 Mo. 95, 99; *Beal* v. *McVicker*, 3 Mo. App. 592. The rule requiring transfers to be made with the "approval of the board of directors" does not affect the plaintiff's right to subject this membership to his judgment claim. The right to impose this restriction upon the transfer of shares "frequently happens in corporations." — 1 Lindley on Partnership, etc., * 702; *Penny's Case*, 8 Chanc. App. 446; *Robinson* v. *Bank*, *etc.*, 1 Eq. 32. But the right to impose this restriction by a by-law depends upon express authority in the charter, and in the absence of such express authority, the by-law is void. — Morawetz on Corporations, sect. 321; *Moore* v. *Bank*, 52 Mo. 377; *Chouteau* v. *Harris*, 20 Mo. 382. Such express authority is not given to the Merchants' Exchange of St. Louis.

BAKEWELL, J., delivered the opinion of the court.

This was a proceeding by a judgment-creditor of defendant Schieferdecker, to expose to sale, in satisfaction of plaintiff's judgment, a certificate of membership of Scheiferdecker in the Merchants' Exchange of St. Louis.

On hearing, the circuit court made a decree that plaintiff is entitled to subject a certificate of membership, No. 2394, issued by said Exchange to said Scheiferdecker to sale

Digitized by Google

in satisfaction of plaintiff's demand and directing the defendants to deliver the certificate to the sheriff, and directing the sheriff to advertise and sell the same in the manner provided by law for making sales under execution of personalty, and to apply the proceeds to the payment of plaintiff's demand, which is ascertained to be $16,701.19, defendants are also enjoined from transferring the certificate, otherwise than specified in the order of court, which further directs Scheiferdecker, within five days from the sale of the certificate, to execute an assignment to the purchaser, according to the form of the certificate indorsed thereupon.

On the hearing, certain acts of the legislature and rules of the Merchants' Exchange were offered in evidence. These are not copied in the bill of exceptions, but the bill stipulates that counsel may, in this court, introduce a certain book of the rules of the Exchange which was introduced on the hearing below, and which contains all these documents. This book does not appear to be filed with the transcript, nor have we seen it. But there seems to be no dispute about its contents; and, for the purposes of this opinion, we shall assume that these acts and rules, so far as needed, are correctly set forth in the briefs of counsel.

It appears from the pleadings and evidence, that plaintiff is the assignee of a judgment rendered in December, 1876, in the St. Louis circuit court against Scheiferdecker for $10,666.74, which is unpaid; and that Scheiferdecker has no property subject to execution, if his membership in the Exchange be left out of question. Scheiferdecker is, and since 1873 has been, a member in good standing of the Merchants' Exchange of St. Louis. His dues are paid. A certificate of membership in the Exchange has been duly issued to him, and is in the hands of the secretary of the Exchange for delivery to him. This certificate, No. 2394, is sealed with the seal of the Exchange and signed by its president and secretary; and sets forth that Scheifer-

Digitized by Google

decker is, on the date named (3d of January, 1882), a member of the Exchange in regular standing; that the membership is subject to annual assessments, and is transferable, on payment of all assessments and a transfer fee of $5, on the books of the corporation to any person approved by the board of directors, on surrender of the certificate. The transfer is to be made according to a form indorsed on the certificate, which purports to transfer the membership subject to the rules of the Exchange, provided that the membership is not found to be forfeited or impaired. The members of the Exchange have the privilege of admission to its floors to transact business, the right of taking part in, and voting at, all deliberations of the Exchange, and the benefit of its market reports and other information. Scheiferdecker is a commission merchant. He was a member before any rule was adopted authorizing transfer of membership. He paid for his membership an initiation fee of $10 and an assessment of $25. The Exchange holds three daily sessions. Its transactions embrace nearly all business in certain lines, specially breadstuffs and provisions. There were at the date of the hearing three thousand five hundred and sixty-five members of the Exchange. The market reports from Liverpool and from leading American cities are daily posted on the building of the Exchange. The revenue of the Exchange is from assessments of its members: $20 from each member per year; rent of chairs, $600; rent of telegraph counters, $800; and interest upon government bonds owned by the Exchange, which, last year, amounted to $10,000. The income exceeds the expenses, and the surplus goes to the reserve fund, which is about $350,000. The market value of certificates of membership varies. Their highest value, during the year preceding April, 1882, was $525; and their lowest, $215. The average attendance on Exchange, is about one thousand two hundred persons. The business of commission merchants requires them to attend almost daily.

Digitized by Google

The Merchants' Exchange of St. Louis was originally a voluntary association, the objects of which, as expressed in the preamble, were to promote the manufacturing and commercial interests of St. Louis, inculcate just principles of trade, maintain uniformity of commercial usage, acquire, preserve, and disseminate business information, and adjust controversies between merchants. It was incorporated in 1863, and the charter was amended in 1865 and again in 1875. It has power to receive and hold and dispose of real and personal property. It is admitted that the privileges of membership are, by the rules, such as are common to mercantile organizations of similiar character. Under rule X., new members are admitted upon written application, with references as to business character and standing, and only on a favorable report of the committee of membership and the approval of the board of directors. The member may be suspended or expelled for violation of rules of the Exchange. Before January, 1882, there was no rule providing for transfer of membership, and every new member had to pay an initiation fee for himself, whether an old member was retiring or not. On January 1, 1882, and before the commencement of the present proceeding, a rule was adopted to the effect that "members of the Exchange, on and after this date, shall be entitled to certificates of membership, which shall be transferable on payment of all assessments due, and a transfer fee of five dollars; subject, however, to the recommendation of the committee on membership, and the approval of the board of directors."

The question presented by the record is one that has arisen of late years and as to which the authorities are not in accord. It is, whether the seat of a member of a merchants' exchange, such as is established in the large centres of commerce, and having a constitution and rules such as usually govern these exchanges and stock exchanges in America; is a species of property which, if not subject to execution by the ordinary process without the intervention of equity, may by proper

Digitized by Google

proceedings on the part of a judgment-creditor, be subjected to sale, and the proceeds applied towards the satisfaction of the judgment, the debtor being compelled to make a transfer, and the exchange to ratify it in accordance with its rules in other cases.

The question seems to have been first considered in the district court for the northern district of Illinois, on argument of a motion for a rule on a bankrupt, a member of the Chicago board of trade, that he assign and transfer to the assignee his certificate of membership in the board. *In re Sutherland*, 6 Biss. 526. The board of trade, in that case, was incorporated, its objects were similar to those of the Merchants' Exchange of which the defendant in the case at bar is a member. As in the present case, membership conferred no pecuniary profit upon the member, except what was derived from the incidental use made of his privilege of membership by the member. Persons were admitted to membership by ballot—a vote of two-thirds being requisite to elect—and were liable to expulsion for violation of the rules, or dishonorable conduct. The admission fee was $1,000. A member in good standing might transfer his certificate to any person eligible, after ten days' notice, approved by a vote of two-thirds of the directors. The selling value of the membership was $500, where buyer and seller could comply with the conditions. It was held, that this membership confers no property rights, represents no interests in property, and conferred privileges similar only to those given by membership of a club or lodge. As the certificate expressed nothing that the assignee could use, except by consent of others, in the absence of authority, and from these supposed analogies, the learned judge determined that the bankrupt's membership can not be treated as a portion of his assets or pass to his assignee, and the motion was denied.

In the same year, the case of *Hyde* v. *Woods* was decided in the supreme court of the United States (94 U. S. 523). The case was this: The San Francisco stock and exchange board was a voluntary association, whose objects are ex-

Digitized by Google

pressed by its name. The members were elected by ballot and limited in number. The constitution provided that a member, on failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and the proceeds, to the exclusion of his outside creditors, shall be first applied for the benefit of members to whom he was indebted; the purchaser does not become a member until elected by ballot. It was held that this provision is not contrary to public policy or to the bankrupt act. Judge Miller, in delivering the opinion of the court, says: "There can be no doubt that the incorporeal right which Fenn had to this seat, when he became bankrupt, was property; and the sum realized by the assignee," ($10,000), "from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt, that if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy; and that if there had been left in the hands of the defendants any balance, after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

Following this case, it was held, in 1877, by the New York superior court at special term, (*Ritterband* v. *Baggett*, 4 Abb. (N. C.) 67), that membership in a board of exchange which has a money value, and is transferable subject to the purchaser's procuring himself to be elected a member, is property, the beneficial interest in which passes to a receiver; and that the receiver may maintain an action to compel the debtor to convey to a member elect with whom the receiver may contract for its sale. The board in question was the New York cotton exchange, an incorporated body. The initiation fees were $5,000. By a by-law, the property could not be assigned to any one but a member or member elect. Other provisions were similar to those noted above in the San Francisco stock exchange.

Three years afterwards the same question came up for consideration in the district court of the United States for

Digitized by Google

the southern district of New York. It was held that a seat in the New York stock exchange is property which passes to an assignee in bankruptcy, and the court required the bankrupt to make the transfer. The same court had recently decided (*Gallagher* v. *Lane, in re*, 19 N. B. R. 224) that a license to occupy certain stalls in a New York market, though revocable at the will of the city, and though the city refused to recognize the rights of the assignee in bankruptcy, under the general assignment, passed to the assignee under the bankrupt law, and had made an order compelling the bankrupt to make a special assignment of his license. Judge Choate, in his opinion, says, that the case of the seat in the stock exchange can not be distinguished in principle from the market license case. "As in that case," he proceeds, "the consent of the city was necessary to a transfer, so here the consent of a committee of the stock exchange is necessary to a transfer of this right. The seat, however, has an actual pecuniary value which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is, to all intents and purposes, a business right or privilege, useful for business purposes only. I see nothing in the rules of the exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy with the co-operation of the bankrupt, subject to the condition above mentioned." The learned judge then cites *Hyde* v. *Woods* (*supra*), as directly in point, and says that if *In re Sutherland* (*supra*), can not be distinguished from *Hyde* v. *Woods* (which seems to be difficult), it is not to be followed; and that he is not satisfied with the reasoning in the Gallagher case.

The next cases to be considered, in chronological order, are *Thompson* v. *Adams*, and *Pancoast* v. *Cowan*, reported in ninety-third Pennsylvania Reports (pp. 55 and 66).

Digitized by Google

These cases decide that a seat in the Philadelphia stock exchange is not subject to levy or sale under an ordinary *fieri facias.* As to this, we suppose there can be no question. The proceeds of the seat, when sold, by the rules of that exchange, go, as was the case in *Hyde* v. *Woods* (*supra*), not to the general creditors of the bankrupt, but, first, to his creditors of the stock exchange. Without the intervention of equity, it is difficult to see how such property could be reached. The Pennsylvania decisions do not go so far as to hold that the seat is not property, but hold that it is not property subject to ordinary process at law.

The question is carefully considered in an opinion of the superior court of Cook County, Illinois, per Gardner, J., reported in twenty-first volume of the American Law Register (p. 408). It is there held that certificates of membership in the board of trade of Chicago are property, and, as such, liable for the debts of the owner on a creditor's bill to subject them to the payment of his debts; and that the debtor will be restrained from disposing of his certificate of membership, and ordered to execute a blank assignment thereof to the receiver appointed in the cause. On appeal, this judgment was reversed by the supreme court (*Barclay* v. *Smith*, 16 C. L. J. 437), which refers expressly to the Pennsylvania cases cited above, and says, generally, that it has been referred to other cases holding a different view, but declines to review these cases, and says that it does not think they establish a correct rule, and that the supreme court of Illinois is not inclined to follow them.

These seems to be all the cases directly in point. To these might be added cases in which patent rights and similar interests have been subjected in equity to the payment of judgments. There can be no doubt that the weight of the authority is, that a seat of a member in a stock board or merchants' exchange is a species of property not subject to ordinary execution, but which may be reached by equity processes in such a way as to respect the rules of the

Digitized by Google

exchange and the rights of all parties interested, and at the same time, by proceedings in aid of the execution, to compel an insolvent member to transfer his seat under the rules of the board, and apply the proceeds towards the satisfaction of the debt of his judgment-creditor. And this seems to be the view which has the strongest argument in support of it. The law upon the subject, as deduced from an attempt to reconcile the cases with a view to the facts and circumstances of each case, seems to be well set out by a recent text writer, whose treatise upon stock brokers and stock exchange is a valuable contribution to the learning of the profession upon a subject as to which nothing of importance had hitherto been done towards collecting and reviewing the decisions upon the subject scattered through the volumes of reports in England and at home (Dos Passos on Stock Brokers, p. 96). We are of opinion that the decree of the circuit court should be affirmed; and that no objection can be reasonably made to the sale by the sheriff under the decree, acting under the order of the court in a proceeding such as the one before us, to which the exchange as well as the insolvent member, whose certificate is to be sold, are both parties.

With the concurrence of all the judges, the judgment is affirmed.

FOURTH NATIONAL BANK, Appellant, v. THOMAS S. NOONAN, Respondent.

October 23, 1884.

BAR TO ACTION — SPLITTING DEMANDS. — A recovery by the assignee of a part of a demand is not a bar to a recovery by the original creditor for the balance. The rule relative to the splitting of demands does not apply.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Reversed and remanded.*

Digitized by Google

Finkelnburg & Rassieur, for the appellant: A partial assignee can not recover on his fractional interest, without making his assignor a party. — *Smith* v. *Gary*, 2 Dev. & B. 42, 50. If, however, the debtor chooses to waive his right to resist the division of an entire demand, he may do so, and having done so, he is thereafter estopped from complaining. — *Burnett* v. *Crandall*, 63 Mo. 410; *Lett* v. *Morris*, 4 Simons, 607. Much less can he, by submitting to a judgment for a part, rid himself of his entire liability for the remainder. — *Cook* v. *Ins. Co.*, 8 How. Pr. 514. The doctrine that when a party splits up his cause of action, and recovers a part, he is barred as to the remainder, applies only to cases where the same person is plaintiff in different suits to enforce a single demand. — *Cook* v. *Ins. Co.*, 8 How. Pr. 514.

Smith & Harrison, and John M. Glover, for the respondent: If an entire demand is split up into two or more parts, and a judgment obtained upon one part, it will constitute a bar as to the remainder. — *Flaherty* v. *Taylor*, 35 Mo. 447; *Railroad* v. *Traube*, 59 Mo. 355.

Bakewell, J., delivered the opinion of the court.

This was an action upon a negotiable promissory note for $24,000, dated June 19, payable without grace, five days after notice, executed by defendant, to the order of plaintiff. A credit is given for $8,995.67, proceeds of collaterals pledged to secure the note, and judgment is asked for the remaining sum.

On the day of the trial, the defendant was permitted to file an amended answer, in which, together with other matters of defence, he alleges that on April 6, 1880, plaintiff assigned to one Berkley a portion of the debt and of the note sued upon herein, and that Berkley afterwards recovered judgment upon this portion of the claim. This judgment is pleaded in bar of the action.

All the testimony in support of this defence was objected

Digitized by Google

to as incompetent, irrelevant, and as *res inter alias.* Defendant, however, was permitted to introduce the testimony in support of this defence tending to show the following state of facts: —

On April 6, 1880, plaintiff executed and delivered to Berkley the following paper: —

"ST. LOUIS, April 6, 1880.

"In consideration of $250 in hand paid by Wm. J. Berkley, we do hereby assign and transfer to him $500 out of any proceeds he may collect from T. S. Noonan on his note, dated April 30, 1877, for the sum of $24,000, due five days after notice, now held by us. But this agreement shall not apply to any proceeds realized on collaterals pledged to secure said note, the right to realize on said collaterals being reserved to us exclusively."

Noonan had sued Berkley before McCaffery, a justice of the peace of St. Louis, for a balance of $200 upon a note. In this action Berkley pleaded as a set-off his interest in the Noonan note acquired by the above assignment, setting forth the instrument, and remitting the excess above McCaffery's jurisdiction. On the trial Noonan appeared with his counsel, and made no defence to the set-off, but admitted it. The set-off was allowed, and judgment rendered by the justice in favor of Berkley, and against Noonan, for $50, the difference between the note sued on and the set-off.

Amongst other instructions given at the request of defendant, the court directed the jury that, if they believed from the evidence that plaintiff, on April 6, 1880, executed the paper of that date, and delivered the same to Berkley, and that he held and owned the same at the beginning of this suit, and that the same is the instrument on which the counter-claim in the case of *Noonan* v. *Berkley*, read in evidence, was based, then plaintiff can not recover.

There was a verdict and judgment for defendant. This statement sufficiently sets out the only point arising upon

Digitized by Google

the record which we have found it necessary to examine. If, as we think, the trial court erred in its rulings as to this defence, the judgment must necessarily be reversed.

The rule against splitting demands is one made for the protection of the debtor, to prevent the multiplication of suits for one cause of action; and we have never heard of its being set up successfully against the assignor as a bar to any recovery upon the original cause of action, where the assignor has been neither party nor privy to more than one action upon the claim. If the assignee, for value of a part of a claim, sues upon it, and the defendant does not interpose the defence that the claim can not be split, why should the assignor, who has been a party to no vexatious litigation, and who has no notice of the suit by his assignee, be punished for this by the loss of the remainder of his claim? To make an assignment of a part of a claim, is no offence in the eye of the law. It may be highly beneficial to the debtor, and no reason appears why he may not submit to such a division, if it can be made, and to any or all of its consequences. The creditor himself may be estopped, where by suing for a part only, he seems to admit that no more is due, or where he would vexatiously multiply suits, and increase costs to his debtor, and annoy the courts without a cause; but it has never been held, so far as we know, that a recovery by an assignee of a part of a claim, in an action of which the assignor had no notice, is to destroy the right of the assignor to the balance of his claim. It has been held, on the contrary, that the rule, that where a person splits his demand and recovers a part, he is barred as to the remainder, has no application to a case where the same person is not plaintiff in both actions, and where the assignor has no control over the action for the assigned part of the claim, and has no notice of that suit. *Cook* v. *Ins. Co.*, 8 How. Pr. 514.

It may be questioned whether the evidence showed any assignment of a part of this claim. We do not examine

Digitized by Google

that, as it is immaterial, in the view we take of the effect of the recovery by the assignor.

To hold that the defence attempted in this action was a bar, would be to open the door wide to fraud. And the circumstances shown in the present case are pointed out by counsel for appellant as furnishing some ground for suspicion of collusion between the assignee and the defendant. Both the plaintiff and the defendant, before the justice, gave up large portions of their respective claims to confer jurisdiction. The judgment before the justice is, on March 19th, and on the next day, and on the eve of a trial, the amended answer is filed setting up the new defence. The appellant objected to the filing of the answer, but filed a reply and went to trial. Had appellant insisted upon a continuance, to allow time to investigate the circumstances surrounding the new defence, it could hardly have been refused, except upon the theory that this defence interposed was in its nature untenable, whether the recovery before the justice was collusive or not.

The judgment is reversed and the cause remanded. All the judges concur.

STATE OF MISSOURI, Respondent, v. HENRY P. LANG, Appellant. 14 247 / 174s 72

October 23, 1883.

CRIMINAL LAW—MISDEMEANORS.—The provisions of section 1856, of the Revised Statutes, apply to street cars.

APPEAL from the St. Louis Court of Criminal Correction, NOONAN, J.

Affirmed.

Digitized by Google

TURNER & MORRIS and GOTTSCHALK & BANTZ, for the appellant.

J. R. CLAIBORNE and S. P. GALT, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The information under which defendant was convicted, charged that he threw stones "at car No. 15, whilst the same was in motion, said car then and there being the property of the St. Louis Railroad Company, said railroad then and there being a street railroad run by horse power."

Defendant demurred to the information on the grounds that the information charged no offence against the state of Missouri, and that the statute under which the offence is charged, does not apply to street railroads.

It was provided by section 60, of chapter 201, of the General Statutes of 1865, that "every person who shall maliciously place obstructions on the track of a railroad, or shall tear up or remove any part or portion of a railroad, or the works thereof with intent to obstruct the passage of a car or cars thereon, or to throw them off the track, shall upon conviction be imprisoned in the penitentiary not exceeding twenty years." The next section provides that, "if any person shall, by any of the unlawful acts enumerated in the last preceding section, endanger life, or cause any locomotive or car to be thrown off the track, he shall be punished by imprisonment in the penitentiary not exceeding twenty years."

These provisions were adopted into our statutes in the revision of 1855, from the Kentucky code of 1852. We think that there can be no doubt that they were intended to apply to railroads operated by cars drawn by steam tractors. Street tramways for cars drawn by horses, were not used in the United States at the time the Kentucky law was passed, and they were not known in Missouri in 1855. In 1877, by an act to amend section 60 of chapter 201

Digitized by Google

aforesaid (Sess. Acts 1877, p. 240), this section was amended by adding after the words "off the track," or "shall wilfully and maliciously throw any stone, stick or anything, into or at any train, or into or at any car or locomotive while the same is in motion, or otherwise," the penalty remaining unchanged. This amended act was, we have no doubt, intended to apply exclusively to railroads operated by steam tractors.

In the revision of 1870, the provisions as to throwing stones, which had been inserted as an amendment into section 60 of the acts of 1865, were stricken out of that section, leaving it as before, and these provisions were enacted as a separate section (sect. 1356), the language remaining unchanged, except as to the penalty, so that the section now reads: "Every person who shall wilfully and maliciously throw any stone, stick, or other thing into or at any train, or into or at any car, or locomotive, whilst the same is in motion, or otherwise, shall upon conviction, be guilty of a misdemeanor."

The word "car" is generally used in this country for any wheeled carriage used for carrying goods or passengers upon a railroad, whether the road be a tramway over the streets of a city, to be operated by horses, or a more extended road to be worked by steam tractors. The legislature when it enacted this section as an independent provision, and reduced the offence to a misdemeanor, probably intended that the act should apply to railroad cars of every description. The language is broad enough to cover all such cars; the nature of the offence is the same; there appears to be no reasons why a distinction should be made between the offence of throwing stones at the cars of a railroad operated by steam, and at those of a railroad on which horse power is used. The statute, in the plain meaning of its terms, covers the offence with which defendant was charged, and we see no reason for saying, that because from its context the word "car" in

Digitized by Google

the section as originally placed, was apparently meant to apply to cars on railroads operated by steam tractors, therefore, when this provision of the section was removed from its context and enacted as an independent provision, the word "car" is not to be taken in its obvious and usual meaning.

We think the demurrer was properly overruled. It is not pretended that there is any other error in the conviction, and we think that it should be affirmed. It is so ordered.

All the judges concur.

VERNON K. STEVENSON, Appellant, *v.* AZEL B. HOWARD ET AL., Respondents.

November 6, 1883.

1. EQUITY — JUDGMENTS — CONSTRUCTIVE SERVICE. — To entitle a defendant at law to relief in equity against a judgment by default on publication in an action for back taxes, fraud must appear.
2. —— That the defendant in the back-tax proceeding was a non-resident and had not actual notice is not ground for equitable relief against the judgment.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

BROADHEAD & HAEUSSLER, for the appellant.

M. W. HUFF, for the respondents: If the statute providing for notice by means of publication is strictly followed, such service gives the court jurisdiction, and a judgment obtained on such a service is good and will not be set aside. — *Freeman* v. *Thompson*, 53 Mo. 183; *The State ex rel.* v. *Sargent*, 12 Mo. App. 228; *Kane* v. *McCown*, 55 Mo. 181; *Wellshear* v. *Kelly*, 69 Mo. 345; Freeman on Judgments, sect. 124. And under such a judgment a purchaser

Digitized by Google

will be protected and his title sustained.—Freeman on Judgments, sect. 509; *Reeve* v. *Kennedy*, 43 Cal. 649.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case alleges that plaintiff, on June 30, 1879, was seized in fee of two lots in St. Louis, numbered 18 and 19, of block 8, of Smith's addition to that city. That on the 12th of August, 1878, defendant Rosenblatt, the collector of the revenue for the city of St. Louis, began suit against defendant and said lots for back taxes; upon lot 18 for the year 1873, $33.12; for 1874, $34.62; for 1875, $37.63; for 1876, $36.99; and against lot 19, for 1873, $31.74; for 1874, $33.17; for 1875, $36.24, and for 1876, $35.17, and prayed judgments for the state for the sum of $278.80, being the aggregate back taxes aforesaid, with interest at ten per cent from January 1, 1877, and two per cent as a fee to the collector, and the fee allowed by law to the register and to the attorney of the collector; that judgment was rendered in the circuit court in this action for the aggregate sum of $343.86; that this judgment was rendered against the lots and Stevenson only upon constructive notice by publication; that this judgment was erroneous and void, for the reason that the same was rendered against the two lots together, for the total taxes against both lots, and because said judgments erroneously direct that said real estate, or so much thereof as may be necessary to satisfy the same, be sold and a special *fieri facias* issue thereon; that Rosenblatt caused an execution, general and special, to issue on said judgment, directed to the then sheriff of the city of St. Louis; that the sheriff levied this execution upon these lots and thereunder sold these lots together to defendant Howard for $555.00, a grossly inadequate sum, in fraud of plaintiff's rights, and executed a deed to Howard, in pursuance of said sale, and that Howard is in possession under this deed.

The prayer is, that this judgment and the proceedings

Digitized by Google

thereunder be annulled; that the deed be cancelled; that an account be taken and plaintiff be allowed to redeem, on paying to Howard the amount expended by him and interest, and that plaintiff be put in possession.

To this petition Howard demurred on the ground that the petition did not allege sufficient constitutive facts. Rosenblatt also demurred on this ground, and on the further ground that he was not a necessary party. These demurrers were sustained and there was a final judgment for defendants.

We have already considered these objections to this judgment and to the proceedings thereunder, in the case of *Howard* v. *Stevenson* (11 Mo. App. 410). And that case must be considered as decisive of the one at bar. That was an action of ejectment in which the defendant in the present action as a purchaser at the tax sale in question here recovered possession under the tax deed of these same lots against the plaintiff in this action, having purchased this same property at the sale under the judgment for back taxes.

The sale by the sheriff was not void. The defendant, if he thought the sale so irregular that it ought to be set aside on that ground, should have prosecuted an appeal from the judgment in the back-tax proceeding. As the matter stands he is concluded by that judgment. It is true that he was not personally served, and that there was a default. But there is no allegation of fraud, nor that the publication was not made according to law. The statute provides for service upon non-resident defendants by publication, and there can be no question that a judgment which will bind the real estate of a non-resident defendant may be made upon such constructive service. Rev. Stats., sect. 6836. The mere fact that service upon the defendant was constructive is not in itself a ground for relief against a judgment obtained upon such service. Constructive service as a means of obtaining jurisdiction is not at all contrary to

Digitized by Google

the principles upon which our system of jurisprudence is based, and has always been recognized both at common law and in equity procedure. 3 Black. Comm. 283, 444. If there is any hardship in such a rule it must be found in the fact of want of actual notice. But this can hardly be set up where the judgment was in a proceeding to collect back taxes on real estate. The owner of land in a state of which he is not a resident may readily make himself familiar with its revenue law, and can hardly be supposed not to know, in a general way, that if he allows his taxes to remain unpaid, he is jeopardizing his title to his land.

Neither an error nor any irregularity of proceeding which does not involve the jurisdiction of the trial court, can be ground for equitable interference to do away with the effect of a judgment. "A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in a court of law." Story's Eq., sect. 1572. To entitle the defendant at law to relief in equity against an erroneous judgment, even though plaintiff was not entitled to recover in that form of action, and judgment was obtained by default, there must be some suggestion of fraud or some good reason assigned for failure to make the defence at law. *Turpin* v. *Thomas*, 2 Hen. & Munf. 139.

We see no equity in plaintiff's bill. The judgment is affirmed. All the judges concur.

AMANDA E. CHRISTY, Appellant, v. FRANCIS G. FLANAGAN, Respondent.

November 6, 1883.

JUDGMENT LIEN — APPEAL — SUPERSEDEAS.— The taking of an appeal which operates as a *supersedeas* does not extend the lien of the judgment beyond the statutory period of three years.

Digitized by Google

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

W. B. THOMPSON and JAMES TAUSSIG, for the appellant.

G. POLLARD, B. F. WEBSTER and R. J. DELANO, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was ejectment. The answer was, not guilty. The cause was tried upon an agreed statement of facts which raised a single question of law. This was certified to the general term of the circuit court, which certified to the court in special term that the plaintiff is not entitled to judgment, and judgment for defendant was entered accordingly.

It appears that, on the 22d of November, 1875, The State to use of Amanda E. Christy, obtained judgment against Thomas Ryan in the St. Louis circuit court, the damages being assessed at $11,626. From this judgment, Ryan appealed to this court, and thence, to the supreme court, and gave bonds which operated as a *supersedeas* till the 2d of July, 1879. At the date of judgment in the circuit court Ryan was seized in fee of the premises described in the petition, which lie in the city of St. Louis. On the 19th of May, 1876, Ryan, for value, conveyed the premises to one Gibbons. And defendant holds title for value under Gibbons, and was in possession at the date of the suit. On the 19th of July, 1879, a *fieri facias* issued under the judgment against Ryan, which was levied on the 12th of September, 1879, on these premises. They were sold on the 7th of October, 1879, under this levy, and the sheriff's deed was executed and delivered to plaintiff on the 8th of December, 1877.

The question is this: Did the appeal extend the lien of the judgment beyond the three years limited by the statute?

The statute provides (Rev. Stats., sect. 2731), that: "The lien of a judgment or decree shall * * * commence on the day of the rendition of the judgment, and shall con-

Digitized by Google

tinue for three years, subject to be revived as hereinafter provided."

Under the act of congress of the 4th of July, 1840, the liens of judgment rendered in the circuit and district courts of the United States, within each state, continue for the same period as the liens of judgments of the state courts.

The question came up squarely for decision in this court in *Chouteau* v. *Nuckolls* (20 Mo. 442). The United States had purchased under an execution of the 25th of August, 1847, issued upon a judgment of the United States circuit court of the 29th of April, 1843. Plaintiff had acquired from the United States; and defendant had, through mesne conveyances, acquired under Robertson, who purchased under execution dated September 10, 1844, issued on a judgment of the Warren circuit court rendered on the 22d of April, 1844. It was decided, that the lien of the judgment of the United States against Gratiot, the original owner of the land, was not extended by the appeal. Judge Scott says, in delivering the opinion of the court: "The lien of this judgment expired then in April, 1846, as, by our law, three years is the duration of the lien of a judgment. The pendency of a writ of error in the supreme court of the United States, on the judgment against Gratiot, did not affect the duration of the lien. The affirmance of that judgment would not prolong its existence, nor would the pendency of the writ continue the lien until the time of affirmance. This we consider plain from the words of the act creating the lien."

The judgment against Gratiot was taken up for review by writ of error, and the judgment we are considering went up by appeal. But this is immaterial. Neither appeal nor writ of error work a *supersedeas* without a bond. Where there is a proper bond, there may be a *supersedeas* in either case.

It is suggested by counsel for appellant that it appears in *Chouteau* v. *Nuckolls* that there was no *supersedeas*, inas-

Digitized by Google

much as execution issued. We do not suppose that it would be contended that a mere appeal which operates no *supersedeas* ought to extend the lien. But a careful consideration of the statement and opinion in *Chouteau* v. *Nuckolls* shows that the execution against the Gratiot land issued on the 25th of August, 1847, three years and four months after the judgment, and that the execution issued on the 6th of August, 1846, in conformity with a special mandate of the supreme court of the United States. This does not tend to show that there was no *supersedeas* pending the appeal, but rather, that execution did not issue until judgment was rendered in the appellate court.

As to the alleged hardship of this interpretation of the statute, that is a matter which is not for us to consider. The statute provides for a revival of the lien, and that, if the *scire facias* be issued before the lien has expired, the judgment of revival shall prevail over any lien which may have accrued after the time limited for the existence of the original judgment lien. Counsel for appellant contends that the *scire facias* would be ineffectual so long as appeal was pending which could operate as a stay of execution. We need not express any opinion as to this. It is enough that the decision in *Chouteau* v. *Nuckolls* turns upon the words of the statute, and is an interpretation of that language which we are not at liberty to disregard. We are aware of nothing in this state in conflict with that decision.

Banks v. *Wells* (12 Mo. 361), is to the effect that, if execution be issued while the judgment is a lien, the effect is to continue the lien until the writ is executed. But this was in accordance with a statutory provision in force at the time, and referred to in the opinion. Rev. Stats. 1845, Executions, sect. 16; Rev. Stats. 1835, Executions, sect. 18. *Meyer* v. *Campbell* (12 Mo. 603), to which we are also cited, decide that, where the judgment of the circuit court is reversed, and a new judgment entered in the appellate court, the execution only enforces the lien of the latter judgment.

Digitized by Google

But this does not conflict with *Chouteau* v. *Nuckolls*. We are referred to cases in Pennsylvania and in California (*Pennock* v. *Hart*, 8 S. & R. 376; *England* v. *Lewis*, 25 Cal. 337), in which it is held, under the statutes of these states, that, on appeal with a bond sufficient to stay proceedings, the lien of the judgment remains pending the appeal. In these cases the judges delivering the opinion of the court seem to concede that they construe away the statutory provision in order to relieve against a supposed hardship, which the legislature, they think, had not foreseen. "If statutes," says Chief Justice Gibson in the case cited above from Pennsylvania, "were in all cases construed according to the letter, scenes of injustice which those who enact them would deplore, would abound in our courts. It is impossible for our legislature to foresee the infinite variety of cases that will fall within the letter of the law they are about to enact, and yet be without the scope of its aim. When one of these occur, what are judges to do? It seems to me they ought to do what their consciences irresistibly persuade them the legislature would have done if its occurrence had been foreseen. No judge ever arrived at a wholesome conclusion by following the letter, either of the written or the unwritten law." This great judge, however, would not have departed, I believe, from a construction of a statute that was fixed by authority. The matter is not a *res integra* in Missouri, and we are not left to deliberate whether or not we will now follow the plain letter of the statute. The statute as construed by the supreme court settles the question in controversy, against the appellant, that an appeal, though it be taken under such circumstances as work a *supersedeas*, does not extend the lien of the judgment upon the real estate of defendant beyond the three years limited by the statute.

The judgment is affirmed. All the judges concur.

Digitized by Google

14 258
53 259

14 258
54 238
56 117

14 258
61 89

14 258
80 162

14 258
188 228

14 258
90 48

HENRY ERDBRUEGGER, Respondent, *v.* ANTON MEIER, Appellant.

November 6, 1883.

PRACTICE — MOTION IN ARREST. — A general finding for the plaintiff without any special finding upon the defendant's counter-claim is an imperfect finding, of which advantage can be taken only by a motion in arrest of judgment.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Affirmed.

FREDERICK GOTTSCHALK for the appellant: There must be a separate finding upon each issue.—*Clark* v. *Railroad*, 36 Mo. 215; *The State ex rel.* v. *Dulle*, 45 Mo. 270; *Brownell* v. *Railroad*, 47 Mo. 243.

COLLIER & MUENCH, for the respondent: "Where the finding is a general one, it will raise a presumption that all the issues have been duly considered by the jury (*Stout* v. *Calver*, 6 Mo. 256); and where the finding is merely defective or imperfect, the judgment will not be reversed, unless a motion has been made in the inferior court to arrest the judgment, and overruled."—*Finney* v. *The State, etc.*, 9 Mo. 636; *Mooney* v. *Kennett*, 19 Mo. 551; *Davidson* v. *Peck*, 4 Mo. 446; *Pitts* v. *Turgate*, 41 Mo. 406; *St. Louis* v. *Allen*, 53 Mo. 49.

BAKEWELL, J., delivered the opinion of the court.

This was an action for a balance of $130, due for extra work in building a dwelling house for defendant.

The answer has three counts. The first is a general denial. The second sets out that the building was to be erected according to certain plans and specifications, and specifies sundry particulars in which the building, as erected, varies from the contract; by reason of all which

Digitized by Google

it is alleged that the house as erected is worth $500 less than the house required by the plans and specifications. The third count sets up a counter-claim for work done by defendant for plaintiff worth $42, for which defendant asks judgment. The replication denies the new matter in the answer, says that all the changes were made under the contract by consent of both parties, and denies that the building was lessened in value by all of them, and alleges that defendant accepted the building as complying with the contract, and expressly waived any claim for departure from the specifications. As to the second counter-claim, there is a denial of all allegations in respect to it. A jury was waived, and the court found for plaintiff the sum of $106.50.

The only ground upon which we are asked to reverse the judgment is, that there was not a separate finding on each issue, and on each of the last two counts of the answer.

In support of this view, we are referred to some cases (36 Mo. 215; 45 Mo. 270, and 47 Mo. 243), in which it is held that, where a petition sets out two or more causes of action or subjects of complaint there should be a separate assessment on each count, and a verdict for a gross sum can not be sustained, and furnishes sufficient matter for arrest of judgment on motion.

If there is anything in the objection in the present case, the matter is not properly saved for review.

There is no question as to the merits: and it might fairly be considered in the present case that the general finding for plaintiff should be regarded as an express negative to every plea. The ancient practice is relaxed; and, at a time, and in states where attention to form was more rigidly enforced than it is at present with us, a similar finding has been sustained; and it has been called an "affectation of precision" by Chief Justice Gibson, to arrest the judgment on grounds so purely technical. *Strohecker* v. *Drinkle*, 16 S. & R. 39. But, be that as it may, the

Digitized by Google

question could only be raised by motion in arrest. Where the verdict finds only part of the matter in issue, omitting to find either way another material part, that is ground for arresting the judgment. Steph. Plead., note 7. It is an imperfect finding; and that can be taken advantage of only by motion in arrest. *Finney* v. *The State*, 9 Mo. 642.

It may be said that "mistake of the jury" is one of the statutory grounds for new trial. Rev. Stats., sect. 3704. But the finding of an imperfect verdict, or a neglect to find a verdict on all the issues, is not a mistake of the jury within the meaning of this section.

It has always been held, so far as we know, that a motion in arrest is the proper mode of reaching an imperfect verdict. This being so, it is well settled that the appellate courts will not review errors to which the attention of the trial court was not properly called.

The judgment is affirmed. Judge LEWIS concurs. Judge THOMPSON dissents.

Dissenting opinion of THOMPSON, J.

This is an action for a balance due on a building contract. The answer contains three counts: 1. A general denial. 2. A count in the nature of a plea in recoupment. 3. A counter-claim setting up that the defendant is indebted to the plaintiff in the sum of $42, on an independent contract, for which the defendant asks judgment by way of set-off. The plaintiff filed a reply putting this new matter in issue. The case was tried by the court without a jury. The bill of exceptions recites that there was evidence tending to prove the averments of the petition and reply, and also evidence tending to prove the averments of the answer. All of the declarations of law asked for by both parties were given except one, and that is not in the record. The entry of the final judgment recites: "The court finds the issues herein joined in favor of the said plaintiff, and doth

Digitized by Google

assess the damages sustained by the said plaintiff by reason of the premises at the sum of $106.50. It is, therefore, considered," etc. The defendant filed no motion in arrest of judgment, but he filed a motion for a new trial, in which one of the grounds taken was that the finding was "not responsive to all the issues."

It appears from the foregoing statement that the court made no distinct finding upon this counter-claim for $42, arising upon an independent contract. This, I think, was error. The defendant had pleaded it; it was a distinct and independent cause of action upon which he was entitled to invoke the judgment of the court; and he was entitled to have the amount found due in respect of it, if anything, set off against any amount which might be found due from him to the plaintiff, upon the plaintiff's cause of action against him.

It has long been the rule in this state that a general verdict in favor of the plaintiff upon a petition which sets up in separate counts several distinct causes of action, is erroneous. *Mooney* v. *Kennett*, 19 Mo. 551; *Clark* v. *Railroad Co.*, 36 Mo. 202, 215; *Pitts* v. *Fugate*, 41 Mo. 405; *The State ex rel.* v. *Dulle*, 45 Mo. 269; *Bigelow* v. *North Mo. R. Co.*, 48 Mo. 510; *St. Louis* v. *Allen*, 53 Mo. 44; *Owens* v. *Hannibal, etc., R. Co.*, 58 Mo. 386, 394; *Seibert* v. *Allen*, 61 Mo. 482, 488. For stronger reasons, where an independent cause of action, arising upon a contract entirely disconnected from the plaintiff's cause of action, is set up by way of counter-claim, the defendant is entitled to a distinct verdict thereon.

But the question remains, was this error properly brought to the attention of the trial court by a motion for a new trial? Beyond question, the general practice has been to raise the question that the verdict of the jury, or the finding of the court sitting as a jury, is not responsive to the issues, by a motion in arrest of judgment. *Davidson* v. *Peck*, 4 Mo. 438; *Griffin* v. *Samuel*, 6 Mo. 51; *Finney*

Digitized by Google

v. *The State*, 9 Mo. 632, 636; *Clark* v. *Hannibal, etc., R. Co.*, 36 Mo. 202, 215; *Pitts* v. *Fugate*, 41 Mo. 405; *The State ex rel.* v. *Dulle*, 45 Mo. 269, 271; *St. Louis* v. *Allen*, 53 Mo. 44; *Owens* v. *Hannibal, etc., R. Co.*, 58 Mo. 386, 394; *Seibert* v. *Allen*, 61 Mo. 482. It is equally true that before our present practice act it was several times held that judgments would not be reversed for this cause in the supreme court unless motions had been made to arrest the judgment for such cause in the court below, and overruled. *Davidson* v. *Peck*, 4 Mo. 438; *Griffin* v. *Samuel*, 6 Mo. 51; *Finney* v. *The State*, 9 Mo. 632, 636. It does not appear that in any of these cases an attempt was made to raise the question by a motion for a new trial merely, and hence, it does not appear that the judgment of the court was distinctly invoked upon the question whether it could be raised by such a motion. But it will be perceived that the reason given for requiring it to be raised by a motion in arrest of judgment, was precisely the same as the reason which has been given by the supreme court and by this court for requiring the party complaining of errors which were committed at the trial, to make his complaint to the trial court by a motion for a new trial. Thus, in one of the cases above cited, it was said by Scott, J., as a reason for requiring the defect under consideration to be taken advantage of by a motion in arrest of judgment, that "inasmuch as the attention of the circuit court was not directed to the defect where it could have been readily corrected, no advantage could be taken of it here." *Finney* v. *The State*, *supra*. Following down through the cases which have arisen under our present practice act, I can find none where an opinion is distinctly indicated that such a defect *must* be taken advantage of by a motion in arrest, and that it *can not* be taken advantage of by a motion for a new trial. Two or three cases are found which indicate the contrary. Thus, it was said in one case, by Birch, J.: "Our jurisdiction being appellate purely, we are, of course, unau-

Digitized by Google

thorized to consider anything as a ground for reviewing a proceeding or a judgment here which was not brought to the notice, and hence not finally passed upon in the court below, either *in the motion for a new trial, if the alleged errors have relation to proceedings during the trial*, or in arrest of judgment if going to," the pleadings. *Warner* v. *Morin*, 13 Mo. 455. In a later case the supreme court was asked to reverse a judgment because there had been a general verdict upon a petition which stated in several counts as many distinct causes of action. There had been a motion for a new trial, but no motion in arrest of judgment. The motion for a new trial did not set up the defect of the verdict. The supreme court held, on the authority of a numerous line of decisions, that the verdict was erroneous; but at the same time it held that the error afforded no ground for reversing the judgment, not because it had not been brought to the attention of the court below by a motion in arrest of judgment, but because it had not been set up in the motion for a new trial. Wagner, J., used the following language: "It is equally well established that, if a party wishes to avail himself of the error, he must raise the objection and bring the matter to the attention of the court trying the cause *by an appropriate motion*. Such a course was not pursued in this case. No objection to the form of the verdict or the finding of the jury was included in the motion. The point is now raised in this court for the first time. This practice is not permissible." *Bigelow* v. *North Mo. R. Co.*, 48 Mo. 510, 512. It thus appears that the supreme court refused to consider the matter because it had not been "included in the motion" for new trial, because that was the only motion that had been filed, and it was the only motion which the court could have intended to indicate by using the definite article. It would seem clear, then, that the court meant to convey an opinion that the motion for a new trial, if it had contained this objection, would have been "an appropriate motion." In a still later case the same objection was made to a judgment, that it was based

Digitized by Google

on a general verdict in favor of the plaintiff upon a petition setting up in several counts several distinct causes of action. The supreme court refused to consider it, because the motion *for a new trial* did not call the attention of the court to the objection. Vories, J., said: "The motion for a new trial in this case did not call the attention of the court to this objection. The only thing that approached such objection was that 'the finding or verdict is not specific or proper.' This is not sufficient. If the objection has been made to the trial court, that there was no separate finding on the several counts in the petition, the court, having tried the cause without a jury, would doubtless have corrected its finding, and the defendant would have had no cause to appeal to this court to have the finding corrected or the judgment reversed." *Fickle* v. *St. Louis, Kansas City & Northern R. Co.*, 54 Mo. 219.

It is thus perceived that the reason which led the early court to say that this defect must be raised in the court below by a motion in arrest of judgment was precisely the same as that which led the later court to say that it must be raised by a motion for a new trial, or by "an appropriate motion." The reason in either case was that the court below ought to have an opportunity of correcting its own errors before the prevailing party should be put to the delay and expense of being dragged before an appellate court; — and, indeed, it will be found that, where the court have reiterated this rule, they have generally coupled these two motions together, and have said that, except those errors which appear on the face of the record proper, before the supreme court will notice any errors committed by the trial court, they must be brought to the attention of the court by motion for a new trial or in arrest of judgment. *Banks* v. *Lades*, 39 Mo. 407; *Warner* v. *Morin*, 13 Mo. 455; *Powell* v. *Bevin*, 11 Mo. App. 216, 220, 221, and cases there cited. Now, is there any reason growing out of the nature of the motion in arrest of judgment or the motion for a new trial, why the error here complained of

Digitized by Google

could not have been brought to the attention of the court below by either motion? I can see no such reason. The most usual office of the motion in arrest of judgment is to object to the entering of judgment upon the verdict because of some uncured defect in the petition. *Gilstrap* v. *Felts*, 50 Mo. 428, 432. In its most usual office it is designed to test the sufficiency of the petition. *Pickering* v. *Mississippi Tel. Co.*, 47 Mo. 457, 460. It brings to the notice of the court a ground of objection to the judgment which has reference to the pleadings. *Warner* v. *Morin*, 13 Mo. 455. In this office of the motion it goes to the root of the plaintiff's case, and where it prevails, it invokes the judgment of the court in favor of the defendant, and the judgment in such cases, is that the defendant go hence.

But where it does not attack the sufficiency of the plaintiff's petition, where it objects to the entry of judgment upon the verdict for some matter not connected with the pleadings, its office is precisely the same as that of a motion for new trial. It simply vacates the judgment and reinstates the cause upon the docket for another trial; and it is error, where the motion is thus used, to render judgment, in sustaining it, that the defendant go hence. *The State* v. *Koerner*, 51 Mo. 174.

Now, the office of the motion in arrest of judgment, where it questions the sufficiency of the verdict, being precisely the same as that of a motion for new trial, and the reason for requiring it to be made in the court below being precisely the same as the reason which requires the motion for new trial to be made, namely, that the attention of the court below may be called to its own errors, I confess myself unable to think of any ground on which it can be said that the objection to this verdict could only be raised by motion in arrest of judgment, unless there is something in the statutory grounds for granting new trials as they exist at the present time which prevents such an use being made of the motion for new trial. Those grounds are found in section 3704 of the Revised Statutes. One of them

Digitized by Google

is "a mistake by the jury." Now, where several distinct issues are submitted to a jury, each one of which calls for a separate finding, and as to one of them no verdict at all is returned, it is clearly seen that there has been a "mistake by the jury." If an imperfect verdict is not a mistake by the jury, I am unable to understand what mistake the jury could make which could properly be called a mistake. Where a court sits as a jury and makes a mistake in its finding, it will not, I take it, be questioned that such a mistake will be ground for a motion for a new trial if the same mistake committed by a jury would have afforded such ground.

I, therefore, have not the smallest doubt that the error in the finding of the court was properly saved by the defendant's motion for a new trial, so as to be made a ground of error in this court; and I think that because of this error the judgment ought to be reversed.

In dissenting from the opinion of the court which has been delivered in this case, I have felt that the question was of such importance that I ought to put my views in writing. I think it a matter of no slight consequence that we are to have a rule of practice opposed, as I understand it, to the very words of the statute relating to new trials, under which one kind of mistake committed by the jury is waived unless it is brought to the attention of the trial court within four days after the rendition of the judgment, by a motion for a new trial, and another kind of mistake committed by the jury is waived unless it is brought to the attention of the trial court within four days after the rendition of the judgment, by a motion in arrest of judgment. These refinements of practice serve as pitfalls into which the most skilful practitioners are liable at times to stumble, wrecking in their fall the rights of their clients. The reason of the rule of practice which required the fact that the verdict was not responsive to the issues to be raised by a motion in arrest of judgment was handed down to us from the English practice, in which there was no distinctive motion for

Digitized by Google

a new trial. The reason which required such an error to be raised exclusively in this way, has wholly ceased under our practice; and, in my opinion, the rule ought to cease with the reason on which it was founded. The fundamental idea of our practice act is that the trial court shall have an opportunity to review its own errors, before the successful party shall be put to the delay and expense of an appellate proceeding in a higher court. In my view, this office is subserved in respect of every error committed at the trial of the cause, whether by the court or by the jury, when such error is brought to the attention of the court within four days after the rendition of the judgment, by a motion for a new trial. I do not question at all, that the error of the verdict, not being responsive to the issues, can also be brought to the attention of the court by a motion in arrest of judgment.

---

14 297
71 185
14 267
170s 1308

AUGUST F. ZELLE, Respondent, v. JOHN H. BOBB ET AL., Appellants.

November 6, 1883.

1. COSTS — EXECUTION — PARTITION — PRACTICE. — In partition, an execution for costs should be against all the defendants jointly and should set out the interests of the parties, in conformity with the judgment.

2. —— APPEALS. — Any party to partition proceedings who is liable for the costs may appeal from an order directing separate executions for the costs against each defendant.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Reversed and remanded.*

T. J. ROWE, for the appellants.

DANIEL DILLON, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

In the above entitled cause, which was for the partition of land, the decree was that John H. Bobb is entitled to

Digitized by Google

one-half of the land in fee and to one-tenth in remainder; the other parties respectively were found entitled to separate interests set out in the decree, from which there was no appeal.

On this decree, an execution was issued for costs, which amounted to $1,440.85. This execution commanded the sheriff to make these costs out of the goods, chattels, and real estate of the parties to the action, naming them, but saying nothing as to their respective interests.

Plaintiff moved to amend this execution so as to set forth the respective interests of the parties to the cause as stated in the decree; and, on the same day, the clerk moved for leave to amend. The court sustained the motion; and ordered that the execution "be amended by striking out in the mandatory clause of the writ the names of all the parties save one, and inserting, after the words, 'made the,' the fractional share adjudged against remaining defendants, so as to make the writ perfectly conform to the decree as to one party, and then take new several executions against the remaining parties chargeable with costs."

The execution was then amended so as to read as follows: "Whereas on 22d day of June, 1882, at our circuit court, city of St. Louis, before one of the judges thereof, in a certain cause therein pending wherein August F. Zelle, was plaintiff, and John H. Bobb, Cora B. Taylor, and James B. Taylor her husband, Philip M. Bobb, Charles H. Bobb and Irene Bobb were defendants, it was adjudged and decreed that the parties hereto pay the costs of this proceeding, amounting in the aggregate to the sum of $1,440.85, according to their respective rights and interests in the lands which are the subject of this proceeding. These are, therefore, to command you, that, of the goods and chattels and real estate of the said John H. Bobb, you cause to be made one-half of the aggregate costs," etc.

John H. Bobb excepted to this action of the court; and he, and defendants, Charles and Philip, appeal.

Digitized by Google

The statute provides (Rev. Stats., sect. 1006) that costs in partition shall be paid by the parties plaintiff and defendant, according to their respective interests in the land; and that judgment shall be against each party for his respective share of costs; and that, "against all parties to such proceedings amongst whom partition shall be made in kind, an execution may issue and shall be levied on the lands, tenements, goods, and chattels of party to such proceedings whose share is set off in kind; provided that no lands, tenements, goods, or chattels, shall be levied upon and sold under and by virtue of such execution, except for the satisfaction of such part of said costs as may be adjudged against the owner thereof."

The first execution was clearly bad. The order amending it provides for several executions, and this, we think, is not in accordance with the statute. The execution ought also to set out the interests of the respective parties in conformity with the judgment. Independently of the statute, the execution ought to appear to be against all the defendants. Freeman Ex., sect. 42 and cases.

Respondent urges that appellant John H. Bobb can not be prejudiced, and that the other defendants are not concerned with the form of execution against John H. Bobb. But we think that all the defendants have a right to insist that execution be issued in conformity with the statute, and each and all of them may be interested in the regularity of the process.

It is suggested that since the appeal John H. Bobb has paid the execution against him, and we are asked to look at the return of the sheriff in the execution against John H. Bobb, which is filed here, with a motion to dismiss the appeal. We look only at the record before us. But, if the fact be as suggested, we can not see that it is material. The court in sustaining the motion to amend, directs several executions against the numerous parties to the action.

Digitized by Google

This order, we think, was erroneous, and we regard it as a final order from which an appeal will lie by any party to the action whom it may be calculated to prejudice.

The order amending the execution will be reversed and the cause remanded. All the judges concur.

14a 270
31a 373
31a 374

14 270
47 289

14 270
59 660

14 270
75 358

14 270
81 538

14 270
f55 94

NELS NELSON, Respondent, v. JAMES E. WITHROW, ADMINISTRATOR ET AL., Appellant.

November 6, 1883.

1. **PRACTICE — BILL OF EXCEPTIONS — NEW TRIAL. — An appellate court will review questions raised upon exceptions to a referee's report which is wholly in writing, though the motion for a new trial was overruled at the second term after judgment, and though a continuance of the motion from the first to the second term after judgment does not affirmatively appear.**
2. **—— The case of *Givens* v. *Van Studdiford* (13 Mo. App. 168), considered and approved.**
3. **MECHANIC'S LIENS — STATEMENT OF ACCOUNT. — An account filed as the foundation of a mechanic's lien, which contains a general charge, including an item for which no lien is given, will not support a lien.**
4. **—— Defects in such an account are not cured by oral evidence from which the jury may separate the items for which a lien is given from those for which a lien is not given.**
5. **—— A sub-contractor's account which refers for its items to the contract between the contractor and the sub-contractor is not a sufficient basis for a lien.**
6. **—— The amount of the lien charge must certainly and definitely appear from the account filed.**
7. **—— APPLICATION OF PAYMENTS. — A payment by the owner to a sub-contractor without directions as to its application will be applied to those items for which the sub-contractor has a lien right.**

APPEAL from the St. Louis Circuit Court, LINDLEY, J.

Reversed and judgment.

GEO. P. STRONG, for the appellant: The plaintiff, by his own act, has so mingled his lien claim with his claim for

Digitized by Google

which he has no lien, that they can not be separated, and thereby he has deprived himself of the benefit of the law. — *Blakey* v. *Blakey*, 27 Mo. 39; *Bader* v. *Bensberg*, 6 Mo. App. 445; *Kershaw* v. *Fitzpatrick*, 3 Mo. App. 575; *Egan* v. *Salisbury*, 17 Mo. 271. "It is the just and true account," which by the statute is to be a lien, and where none is filed, there is no lien, in its inception. — *Mc Williams* v. *Allan*, 45 Mo. 574; *Lowis* v. *Cutter*, 6 Mo. App. 54. The lien claim must set out the items. — *King* v. *Railway*, 7 Mo. App. 410.

R. R. FLITCRAFT, for the respondent: The bill of exceptions was not filed in time (*Elliott* v. *Pogue*, 20 Mo. 263; *Ellis* v. *Anderson*, 25 Mo. 327; *West* v. *Fowler*, 55 Mo. 300; *The State* v. *Duckworth*, 68 Mo. 156; *Bosley* v. *Hart*, 7 Mo. App. 581; *Coste* v. *Stifel*, 8 Mo. App. 601), and hence will not be received on appeal. — *Givens* v. *Van Studdiford*, 13 Mo. App. 168. The owner can not by voluntary and improvident payments to the contractor defeat a sub-contractor's lien. — *Garnett* v. *Berry*, 3 Mo. App. 197. The creditor may, in the absence of a direction by the debtor, apply payments to any demand which he may have against the debtor.—*Brady* v. *Hill*, 1 Mo. 315; *Middleton* v. *Frame*, 21 Mo. 412; *Waterman* v. *Younger*, 49 Mo. 413; *Gantner* v. *Kemper*, 58 Mo. 567.

THOMPSON, J., delivered the opinion of the court.

1. The defendant contends at the outset that there is no bill of exceptions in the record which we can consider. It appears, from the record entries in the transcript, that the original judgment was rendered at the June term, 1882, and that motions for a new trial and in arrest of judgment were filed at the same term, and within four days. It also appears that, at that term, an order was made of record continuing all causes and all motions and demurrers undisposed of until the next term. This carried the motions for a new trial, and in arrest of judgment over to the October term. Then, at the October term, on motion of the plain-

Digitized by Google

tiff, it appearing to the court that a clerical error existed in the judgment as originally entered, the court, from the *data* furnished by the referee's report, entered a corrected judgment, *nunc pro tunc*, as of the June term. Then, no general or special order of continuance, nor any further order, appears in the case until the December term, when the court made an order overruling the motions for a new trial and in arrest of judgment, and at the same term the bill of exceptions was signed. It thus appears that the bill of exceptions was signed at the second term after the judgment, in conformity with the referee's report as originally entered; that one continuance of the motions for new trial and in arrest of judgment appears of record, and that, in order to consider the bill of exceptions a part of the record a second continuance will have to be presumed. It has been ruled in several cases, by the supreme court and by this court, in general terms, that a bill of exceptions can not be signed after the lapse of the term at which the judgment was rendered, except by consent of the parties appearing of record. *Ruble* v. *Thomasson*, 20 Mo. 263; *Ellis* v. *Andrews*, 25 Mo. 327; *West* v. *Fowler*, 55 Mo. 300; *West* v. *Fowler*, 59 Mo. 40; *The State* v. *Duckworth*, 68 Mo. 156; *Bosley* v. *Hart*, 7 Mo. App. 581; *Coste* v. *Stifel*, 8 Mo. App. 601; and see *Givens* v. *Van Studdiford*, 13 Mo. App. 168. In all of these cases, except the last, it seems to have been understood that the case was in such a state that the bill of exceptions could have been filed before the lapse of the term. Thus, in the earliest case above cited, it is said by Scott, J: "No reason appearing in the record why the bill of exceptions filed in this case was not made up until the term subsequent to the trial of the cause, it must be stricken out, and the judgment affirmed." *Ruble* v. *Thomasson*, 20 Mo. 263. And in the next case it is said by the same learned judge: "This bill of exceptions is stricken out of the record, nothing beyond the control of the parties appearing to have prevented its being signed within the time agreed upon." *Ellis* v. *Andrews*, 25 Mo.

Digitized by Google

327, 329. He quotes with approval the language of Tomkins, J., in an earlier case, occurring under a prior statute, where a party had neglected to present his bill of exceptions until the term of office of the judge who presided at the trial had expired. The court held that a bill of exceptions signed by the successor of such judge could not be considered; nor was it deemed a hard case, because the statute contemplated that exceptions should be taken and written out, and bills of exceptions tendered during the progress of the trial, and a party not having done this, must take the consequences of his negligence. But where the signing of the bill of exceptions at the term at which the judgment is rendered is not due to the laches of the exceptor, but is prevented by the act of the judge in taking under advisement a motion for a new trial, and continuing or holding it from term to term, it is difficult to see upon what principle this rule can apply, except with reference to such exceptions as might have been taken during the progress of the trial. All of the exceptions insisted upon in this case relate to supposed errors committed by the court in rendering the judgment itself. It is true that they reach behind the judgment and attack the report of the referee in respect of his rulings, both as to the law and facts. But in the state of our rules of practice, none of these exceptions could have been rendered availing, and not a line in the bill of exceptions could have been considered by this court unless a motion for a new trial had been filed and overruled, and an exception saved to the order of the court overruling the same. *Bevin* v. *Powell*, 11 Mo. App. 216. In view, then, of the defendant's situation in this case, it may be asked whether a party against whom an unjust judgment is rendered, is to lose his right to have it corrected by an appeal or writ of error, through the negligence or misprision of the judge in continuing his motion for a new trial, or in pocketing it and holding it over until a succeeding term without any order continuing it? If this is the law, the absolute right of

Digitized by Google

appeal which the law gives to a party becomes a right subject to the discretion or caprice of the judge by whom the judgment is rendered; and the writ of error, instead of being a writ of right, as it is declared to be by our statute, becomes a mere shadow and a delusion. It may be said that the party against whom the judgment is rendered is entitled to a *mandamus* to compel the trial judge to act on his motion for a new trial before the lapse of the term. It is a mere mockery to suggest such a remedy; for how can he know until the term has elapsed that the judge will not so act? And what appellate court will grant such a *mandamus*, while the term of the trial court at which the judgment has been rendered is still pending? If this is a good rule, a party litigant may be destroyed, not by his own fault, but by the negligence of a single judge. It is a principle that the law does not compel a party to do a vain and useless thing. I apprehend that it may be said with equal propriety, in the construction of a statute establishing a rule of procedure in courts of justice, that it does not contemplate impossibilities, but that parties are not to lose their rights, for not complying with it where compliance is not possible.

On the other hand, it is not to be overlooked that the practice of holding over motions for new trial from term to term often works hardship and injury to the successful party to the suit. Presumptively he is entitled to keep his judgment, and to have the fruits of it without unreasonable delay. If the rulings which led to it are to be revised in an appellate court, he is entitled to have them revised as they were made, and not upon an imperfect or erroneous bill of exceptions. This right may often be defeated or prejudiced by the act of the judge in holding over the motion for a new trial from term to term, until the incidents of the trial and the rulings which he made during it have passed out of his mind.

In *Givens* v. *Van Studdiford* (*supra*), we felt all the dif-

Digitized by Google

ficulties of this question, and that case was not decided without the most earnest consideration. We felt in that case that a line must be drawn somewhere, and we held that we would not presume, for the purpose of giving effect to a bill of exceptions signed at the term at which the motion for a new trial was overruled, which was the third term after the judgment had been rendered, no orders appearing of record continuing the motion, that such orders of continuance had actually been made. We shall adhere to that decision until the question is otherwise decided by the supreme court. Under that decision, the unsuccessful party may avoid any sacrifice of his rights by taking, before the close of the trial term, or at the next term, if the motion for new trial is denied, a bill of exceptions as to all rulings which were made during the progress of the trial. We see nothing for him to do but to wait until the judge passes upon his motion for new trial. If his motion is sustained, his labor in making up his bill of exceptions, it is true, goes for nothing, and he must thank the delay of the judge for the useless expense to which he has been put. If it is overruled, and he wishes to appeal and save the benefit of his former trial, he must take a second bill of exceptions as to this ruling, and then appeal. We see no other way out of the difficulty.

In this case we are asked to go further than we went in *Givens* v. *Van Studdiford*, and to shorten the period of limitation to two terms, as to one of which there was a continuance of the motion for a new trial. We are of opinion that, under the circumstances of this case, we can not do this. The appellant had saved all the exceptions which he now insists upon, in the form of exceptions to the referee's report. That report was based entirely upon evidence which had been taken in writing by the referee, and which was returned into court with his report. The referee's conclusions thereon were also in writing, drawn up in the form of a report to the court with minute detail.

Digitized by Google

Exceptions to this report were also presented in writing, and filed by the clerk among the papers in the cause.

Nothing which had formed the subject of an exception at the trial rested in the memory of the judge; everything was in writing. The appellant had filed his motions for new trial and in arrest of judgment within the time limited by the statute. To have gone further and to have drawn up and procured the judge to sign a formal bill of exceptions at the trial term, or even at the next term, would have been wholly unnecessary, and, in the event of the judge sustaining his motion for new trial, or his motion in arrest of judgment, it would have proved an useless expenditure of clerical labor. We, therefore, hold that, for the purposes of justice, we must presume a second continuance of the motion for a new trial, and that the appellant is entitled to have his bill of exceptions considered.

2. Upon the merits, we are indebted to the referee, before whom this case was tried, and to the counsel on both sides, for such a thorough presentation of it that, though the record is very long, our labors in investigating it have been very much abridged. It is an action to enforce a mechanic's lien. It was referred to a referee to try all the issues, both of fact and of law, and, in conformity with his report, the plaintiff had a judgment. Among the numerous objections made to the conclusions of the referee, our attention has been arrested by one which seems to present an insuperable difficulty in the way of sustaining this judgment. The principal item of the account filed by the plaintiff as the basis of his claim for a mechanic's lien was a lumping charge of $1,900, for "carpenter work furnished * * * as per contract." The contract, when put in evidence, disclosed the fact that this item was not alone for carpenter work, for which the law gives a lien, but that it was also for superintending, for which the law gives no lien. *Raeder* v. *Bensberg*, 6 Mo. App. 445; *Blakey* v. *Blakey*, 27 Mo. 39. The contract did not set out how much was to be paid for

Digitized by Google

doing the carpenter work, and how much for superintending; but it merely recited that the plaintiff "agrees to do all the carpenter work and superintending on the row of houses described, for the sum of $1,900." This seems to bring the case directly within the rule of the supreme court in *Edgar* v. *Salisbury* (17 Mo. 271), and of this court in *Kershaw* v. *Fitzpatrick* (3 Mo. App. 575). The principle of these decisions is that where an account filed as the basis of a claim for a mechanic's lien contains a lumping charge, in which is mingled an item for which the law gives no lien, the statute has not been complied with, and no lien is acquired in respect of such item. The reason of this ruling is that the owner of the building has the right to know, from the account filed, the amount which, under the law, has become a charge upon the property, in order that, by paying or tendering this amount, he may discharge the property of the incumbrance. The learned referee, while conceding this rule of law, reasons that the present case does not fall within it, because the account, as filed, did not embrace the item of superintending according to the terms of the contract to which it referred. We do not concur in this view. The contract referred to in the account filed is either to be treated as a part of the account, or it is not. If it is to be treated as a part of the account, then the case falls precisely within the decisions referred to, where the lumping charge appeared on the face of the account itself. If it is not to be read as a part of the account, then the account is bad under the decision of this court in *Lowis* v. *Cutter* (6 Mo. App. 54), where it was held that such an account, filed by a sub-contractor, which refers for items to the contract between him and the principal contractor, is not a sufficient compliance with the statute. The referee, however, has not overlooked this point, and he reasons, on the authority of *Hilliker* v. *Francisco* (65 Mo. 603), that the account is not bad for this reason, since, as he finds from the evidence, the defendant Partridge, who was the owner of the build-

Digitized by Google

ings, was cognizant of the terms of the contract before tne filing of the lien claim. This, if true, drives us back to the other proposition, and compels us to read the account as though the contract had been set out in it in *hæc verba*.

There is the further consideration that the statute (2 Wag. Stat. 909, sect. 5) required the contractor, in order to establish his lien, to file with the clerk of the circuit court "a just and true account of the demand due him." Now, the account which was filed in this case becomes a just and true account only when the contract to which it refers is read with it. If that is left out of view, then it appears that an account has been filed essentially different from the terms of the contract, which omits a demand which deprives the sub-contractor of his right of lien in respect of the whole item, and which is, hence, a fraud upon the statute. The referee further reasons that the case is not within the principle of the decisions referred to, because it is possible, upon the evidence as to the character of the services which were actually rendered, to apportion the amount which was fairly due for the carpenter work, and also the amount which was fairly due for the superintending; and he has made such an apportionment in this way: He finds from the evidence that, although the plaintiff agreed with the principal contractor to do the entire carpenter work and superintending for $1,900, it was fairly worth $2,770; that the carpenter work was fairly worth $2,000, and the superintending $770. Upon the basis of this evidence of *quantum meruit* and the sum stipulated for in the contract, he strikes a proportion for the purpose of ascertaining what the plaintiff ought to recover for the carpenter work, thus: He finds that the amount which ought to be recovered for the carpenter work is $\frac{2000}{2770}$ of $1,900, or $1,371.85. And, by the same process ($1,900 \times \frac{770}{2770} = 527.05$), he finds that the amount which ought to be rejected from the lien claim for the superintending is $527.05. It is plain that

the mingled and lumped items in the two cases of *Edgar* v. *Salisbury* and *Kershaw* v. *Fitzpatrick* (*supra*), were just as capable of apportionment as the item under consideration in this case, by the same process of examining witnesses as to the reasonable value of the work for which the law gave a lien and the reasonable value of the work for which the law gave no lien; but it is not intimated in the opinion in either of those cases that the defect is curable in this way, and the reasoning of the supreme court in *Edgar* v. *Salisbury* indicates the contrary. It is not sufficient that the amount of the lien can be ascertained by extrinsic evidence, but the owner of the property is entitled to be informed of that fact from the account itself. Accordingly, in that case, it was said by Gamble, J.: "When he [the contractor] charges a single sum for different services, and any of them are of a character for which the law would give no lien, he can not proceed under the statute, because he has filed no proper account, and because it is impossible to ascertain the amount of his lien from the account filed."

This disposes of this item of the account, unless there is force in the contention of the plaintiff's counsel that the plaintiff, being a boss carpenter, and not an architect, is entitled to a lien for superintending. We do not take this view. It was held in *Blakey* v. *Blakey* (27 Mo. 39), that where a builder contracts to build a house, he can have no lien for services rendered in superintending his own workmen. If the principal contractor can not have a lien for such services, we know of no principal on which a subcontractor can have it.

3. This disposes of the case so far as the claim for a lien in respect of the item for $1,900 is concerned. It remains to consider whether the plaintiff is entitled to a lien in respect of a number of small items for extra work, amounting in the aggregate to $258.25. If, as was said by Gamble, J., in *Edgar* v. *Salisbury* (17 Mo. 271, 273), "There is no doubt that if there was an account charging different

Digitized by Google

items, some of which might by law be an incumbrance on the property, and others which did not come within the scope of the statute, the party might pursue his remedy to enforce the lien as far as one was given by law." Of these items, the referee has found that the second, third, fourth, fifth, sixth, seventh, eighth, twelfth, and fourteenth, are correct, amounting in the aggregate to $160.75. But it appears from the plaintiff's account, that the defendant Partridge, the owner of the buildings on which the lien is claimed, had paid him over $700, and as it does not appear from the referee's report that Partridge directed these payments to any specific item, the law will apply them to those parts of the demand in respect of which Partridge stood liable to the plaintiff, that is, to those items of the account in respect of which the plaintiff might have acquired a lien upon the property of Partridge. When so applied, they much more than extinguish such item, and leave no items of account subsisting which could form the basis of the mechanic's lien which the plaintiff claims.

It thus appears that, upon the facts found by the referee, judgment ought to have been entered for the defendant; and accordingly the court here, proceeding to give the judgment which the circuit court should have given, must reverse the judgment of the circuit court, and enter judgment for the defendant. It is so ordered. All the judges concur.

Separate opinion by BAKEWELL, J.

I think that, in this case, one continuance being shown, a second continuance might be presumed for the purpose of enabling us to look at the bill of exceptions. Some things are said by my brother THOMPSON, in treating of the question of the time within which bills of exception must be signed, which are to be taken rather as expressing his views than my own, and by which I do not consider myself as bound by concurring in this opinion.

Digitized by Google

A. A. MELLIER ET AL., Appellants, v. ST. LOUIS AND NEW ORLEANS TRANSPORTATION COMPANY, Respondent.

November 6, 1883.

1. COMMON CARRIERS — BONDED GOODS. — A common carrier of bonded goods who receives goods in bond, for carriage, the bill of lading of which recites that they are to be transported in bond, is liable for a loss arising from a shipment of the goods on an unbonded vessel.
2. —— CONTRACTS OF CARRIAGE — FORWARDER. — A common carrier to whom is tendered goods as a common carrier, can not, without the shipper's knowledge and consent, receive them as a mere forwarder.

APPEAL from the St. Louis Circuit Court, BOYLE, J.

Reversed and remanded.

JOHN G. CHANDLER, for the appellants: Taking the goods out of bond and shipping them on an unbonded vessel constituted a conversion. — Ang. on Car., sects. 431–433. The acceptance of the wine "for transportation in bond to St. Louis," amounted to an express promise to so transport. — Story Eq. Jur., sect. 1041. The bill of lading is the representative of the goods. — Benj. on Sales, sects. 813, 822, 864, note; 1 Sm. Ld. Cas. 400, 417, 421; *Dav. Nat. Bank* v. *Homeyer*, 45 Mo. 145. The acceptance and dealing with the bill of lading was an acceptance of the goods. — Benj. on Sales, sect. 148. The measure of damages is the value of the goods at the time and place of destination, to which the jury may add interest to the time of trial. — *Gray* v. *Packet Co.*, 64 Mo. 47, 50; *Smith* v. *Williams*, 13 Mo. 352; *Sparr* v. *Wellman*, 11 Mo. 230.

GIVEN CAMPBELL, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The petition declares against the defendant as a common carrier of bonded goods, for the loss of certain packages of wine delivered to it at New Orleans, to be conveyed to the

Digitized by Google

plaintiffs at St. Louis in bond. The answer is a general denial. A jury was waived, and the court, after hearing the evidence, ruled adversely to the plaintiffs upon a number of declarations of law submitted by them, and gave of its own motion a declaration of law, upon which the plaintiffs took a voluntary nonsuit, and, having moved the court unsuccessfully to set the same aside, have appealed to this court.

The incorporation of the defendant is admitted. The defendant's articles of association were put in evidence, and these show that it was incorporated for the following purposes: "To carry on the business of transportation upon the waters of the Mississippi River and its tributary waters and other waters of the United States; to lade and carry cargoes of merchandise and other property for hire, * * * and to do and perform all other acts necessary and proper in the business of transporting, storing, and lading goods and merchandise for hire; * * * and to carry on any and all other business in connection with or essential to the business of transportation."

It was also shown that the defendant had given bond to the United States in conformity with the provisions of the act of congress of July 14th, 1870, relating to the transportation of unappraised dutiable goods in bond. This bond was dated January 9, 1880, and contained the following recitals: "Whereas the above bounden St. Louis and New Orleans Transportation Company has applied to be authorized and designated as a common carrier for the transportation of unappraised dutiable merchandise, under sections 2990 to 2998, inclusive, of the Revised Statutes and the rules and regulations prescribed by the secretary of the treasury in pursuance thereof, from the port of New Orleans in the state of Louisiana to the port of St. Louis in the state of Missouri, in the following manner, viz.: In the following named steamers and barges owned and controlled by the said company and plying upon the Mississippi River between the ports named [here followed the names of the boats and barges]: * * * Now, * * * if the

Digitized by Google

above bounden principal shall duly observe and faithfully comply with the laws of the United States and regulations of the treasury department made in pursuance thereof pertaining to the transportation and safe delivery of imported merchandise under the provisions of the act of congress entitled 'An act to reduce internal taxes and for other purposes, approved July 14, 1870, and of the acts amendatory thereof,' and shall pay the necessary expenses of such locks, seals, and other fastenings as may be prescribed by the secretary of the treasury for securing the custody and safe transportation of such merchandise * * * and shall, without delay, transport and make prompt report and safe delivery of all merchandise delivered to said principal for transportation under the provisions of said act to the collector or other proper officer of customs at the port of destination in the manner required by law and the regulations aforesaid," etc. The record shows that this bond was on file in the custom-house at St. Louis and that the company was in the habit of carrying bonded goods; though the company offered evidence tending to show that, for several months prior to the date of the transaction in controversy, it had refused to carry *wines* in bond and had directed its agents at New Orleans not to receive any such wines, because it could not transport the same on its barges secure from theft by its own employes and others.

It also appears, without contradiction, that the defendant, by resolution of its directors, directed its president to execute a customs power of attorney to Allan B. Bennett, which was accordingly done, and the resolution and power were both filed in the custom-house at New Orleans. On the face of the resolution the defendant entitles itself "U. S. bonded line for imports and exports." The resolution bears date July 21, 1881, and directs that the president of the company, Henry Lourey, be, and he is hereby empowered and requested to execute a customs power of attorney in the usual form to Allan B. Bennett, of New Orleans, for

Digitized by Google

the transaction of necessary custom-house business of the company at that port. The power of attorney constituted Bennett the company's attorney for it and in its name, place, and stead, to enter in due form of law at the custom-house in the city of New Orleans, all goods, wares, and merchandise which have been imported or may be hereafter imported by it, or which have arrived or been consigned, or which may hereafter arrive or be consigned to it, or in which it may be interested or concerned; * * * to execute * * * bonds which may be required to secure the duties thereon, or for the transportation or exportation of the same; * * * and generally as its attorney, to do, transact and perform all custom-house business of what kind soever, in which it is or may be interested or concerned, as fully and effectually to all intents and purposes, as it, if present there in person, could do; * * * and generally to do and perform all things relating to the premises which it could lawfully do if personally present, and as fully and effectually, to every intent and purpose, although the same should seem to require more precise or special authority than is herein expressed. * * * It is hereby declared and understood that this power shall be and remain in full force and virtue, until revoked by written notice given to the collector." This power had not been revoked at the time of the trial of this case in the circuit court.

The defendant, also, in its correspondence with business men, used a letter-head, on which it was designated in print as "U. S. bonded line for imports and exports." Its agents for the transaction of its business at New Orleans, Messrs. Seligman, Hellman & Co., used a letter-head upon which the defendant was similarly designated. The evidence shows without dispute that these letter-heads were used at the time of the transaction in controversy, both by the defendant's secretary in St. Louis, in its correspondence with the plaintiff touching this transaction, and also by

Digitized by Google

Messrs. Seligman, Hellman & Co. at New Orleans. Mr. Bennett, to whom the above customs power of attorney had been given, was a clerk in the employ of Messrs. Seligman, Hellman & Co.

We do not understand that the scope of the agency of Seligman, Hellman & Co. is one of the questions arising upon the record, in the view of the declaration of law which the learned judge gave, and which drove the plaintiffs to a nonsuit. We may say, however, in passing, that the evidence leaves no room to question that they were the general agents of the defendant for the purpose of attending to all of its business at New Orleans, touching the receiving of goods for shipment, the collecting of freights, and the attending to business in the custom-house relating to foreign consignments made to the defendant. It also appears that they had power to receive for the defendant bills of lading of foreign shipments; that they had power through Mr. Bennett, who, as already stated, held defendant's customs power of attorney, to do the necessary business in the custom-house with regard to such shipments, to forward such shipments from New Orleans to St. Louis, and generally to do all that was necessary in regard to these things. In most cases, freight contracts were made at the home office, and Seligman, Hellman & Co. were notified of the same.

Such appears to have been the scope of their agency until the tenth day of September, 1881. It appears that on the ninth day of that month the defendant sold all its boats and barges to another corporation, called the Mississippi Valley Transportation Company, and went out of business as a common carrier, except in respect of consignments which had already been made to it, and as to these it had made arrangements with the Mississippi Valley Transportation Company for that company to take charge of such business. On that date, the 10th of September, or possibly on the day before or the day following, the president

Digitized by Google

of the defendant sent to Messrs Seligman, Hellman & Co., its agents at New Orleans, and the latter received, the following telegram: —

"You will please at once turn over to John Stevenson, agent, all barges and other property belonging to this company, taking his receipt for the same in detail. Deliver to him also all up freights now in hand, or to arrive on our contracts or to our care. New company fully organized and in operation. Letter on Monday.

(Signed) "H. LOUREY, *President.*"

A good deal has been said about the arrangement between the defendant and C. H. Wyman, a custom-house broker at St. Louis, by which the defendant had agreed to pay Wyman a small commission on certain goods which he might cause to be shipped over defendant's line.

It appears that Wyman had made known to the defendant's president, Captain Lourey, about a year before the date of the transaction in question, that he had power, in the course of his business, to influence consignments to particular carriers, and that he would be willing to cause goods to be consigned to the defendant, provided a small commission should be paid for that purpose. Captain Lourey then agreed to pay a commission of two and one-half per cent upon the freights that should be consigned to his company through the influence of Mr. Wyman. The evidence is conflicting whether this arrangement was limited to a particular class of freight, which excluded wine, or whether it was made with reference to freights generally, without any specification that the defendant would not receive consignments of particular goods, such as wine. It also appears that the consignment of the freight in controversy was made to the defendant in consequence of this arrangement, and that it came through the agents or correspondents of Wyman, Messrs. Cunningham, Shaw & Co., of Liverpool. We do not regard this matter as an important circumstance in the

Digitized by Google

case, because we do not think it amounted to an agreement between the defendant and Wyman, or between the defendant and any one whom Wyman may have represented as a custom-house broker in connection with the freight in controversy, to carry it from New Orleans to St. Louis at all events.

In this state of things, before the 10th of September, 1881, and consequently while the defendant was engaged in business as a common carrier of United States bonded goods between the port of New Orleans and the port of St. Louis, the plaintiff purchased of Joseph C. Gordon at Jarez de la Frontera, in Spain, certain packages of wine for shipment to St. Louis. They were shipped to Liverpool on board the Corcyra, an English vessel, and were there transhipped on the steamer Charrington for New New Orleans, consigned to the defendant. The bill of lading of the steamer Charrington showed that the goods were shipped by Messrs. Cunningham, Shaw & Co., at Liverpool, for New Orleans, consigned to this defendant "for transportation in bond to St. Louis." This bill of lading appears to have been executed in triplicate. An original of it was received by Seligman, Hellman & Co. before the 10th of September, 1881, and consequently before the company ceased business as a common carrier. It appears that they also received the usual consular certificate. Another original of it was sent to the plaintiffs, and received by them at St. Louis.

The goods had been thus shipped in accordance with shipping instructions given by Wyman to Gordon in St. Louis; Wyman telling Gordon that he must ship them to Liverpool, and Cunningham, Shaw & Co., his (Wyman's) agents, would attend to the rest.

Now, the goods arrived in New Orleans about the 20th of September, ten days after the defendant had sold out its boats and ceased business as a common carrier. They were tendered by Seligman, Hellman & Co., to Mr. Stevenson,

Digitized by Google

agent of the Mississippi Valley Transportation Company, who refused to receive them on the ground that he was not going to carry wine on the barges of his line.

The tender seems to have been made in this way: On receipt of the telegram above mentioned, Seligman, Hellman & Co. turned over to Stevenson, the agent of the new company, the papers and property, including all freight engagements of the defendant, among which was the bill of lading of the steamer Charrington of these wines. These wines could not be gotten out of the custom-house except by Bennett, as they were consigned to the defendant, and as Bennett held the defendant's customs power of attorney, which was not revoked. When Stevenson saw that the goods represented by this bill of lading were wines, he told Bennett that he would not receive them, as he was not going to carry wine on the barges of his line. Now, aside from the boats and barges of Stevenson, there were no boats in port which were authorized to carry bonded goods. In this state of things, Bennett and Seligman, Hellman & Co., and Stevenson, consulted together as to what it was best to do. It seemed there were two things they might have done, which would have exonerated this defendant: 1. As the act of congress relating to the transportation of goods in bond (21 U. S. Stat. at Large, 173), impliedly allowed them to hold the goods for ten days after they were landed from the importing vessel, they might have telegraphed to the plaintiffs for instructions; or (2) they might have paid the freight and sent the goods to a bonded warehouse, and advised the plaintiffs that they had done so. They did neither. They took the goods out of bond and shipped them, consigned to the plaintiffs at St. Louis, on a boat of the Anchor Line, which was not bonded. In doing this, they unquestionably acted in good faith, and did what they supposed was the best thing which they could do for the interest of the plaintiffs. But the testimony clearly shows that the result of what they did was to deprive the goods of

Digitized by Google

their commercial character as bonded goods. That is to say, wines which come to this market in bond, and which the owner is able to deliver lying in a bonded warehouse, have the reputation among merchants of being what they purport to be; the presumption is that they have not been tampered with; but it is not so as to wines which are not sold in bond; and the same quality of wines out of bond, the evidence shows, sells for much less than in bond.

These were substantially the facts of the case; and upon these facts the plaintiffs asked the court for a number of declarations of law, which the court refused. These we need not consider, because the declaration of law which the court gave of its own motion, shows clearly the view which the court took of the law applicable to the facts and the ground on which the case was made to turn. This was as follows: —

"The court of its own motion declares the law to be that, if it appears from the evidence that, at the time the goods in controversy arrived at the port of New Orleans, the defendant had disposed of all its boats or vessels for the carriage of goods, and was not then engaged in the business of a common carrier of goods, either in bond or other wise, then, unless it had agreed so to do, there was no obligation resting on defendant to carry said goods from New Orleans to St. Louis, even though said goods had been consigned to defendant at said port of New Orleans, with directions that they were to be thence transported in bond to said city of St. Louis; and although said goods may have been received by defendants or its agent on their arrival at the port of New Orleans, yet if it appears that the defendant had not previously agreed to carry said goods, and that it or its agent received the same, not as a common carrier, but simply as the consignees thereof at said port, and that it paid the duties on and forwarded said goods to plaintiffs at St. Louis by the steamer Montana in good faith, believing such course to be for the best interest of plaintiffs

Digitized by Google

and because it was unable to procure their transportation to St. Louis in bond, then plaintiffs are not entitled to recover in this action; and the court further instructs that upon the evidence adduced, the defendant can not be held to have agreed to carry said goods by reason of any direction or agreement concerning said goods made by Charles H. Wyman."

In the view we take of the duty of the defendant in the premises, this declaration of law is correct except in two particulars. We agree with the learned judge, that if the defendant, at the time of the arrival of the goods in New Orleans, had disposed of its vessels and gone out of business as a common carrier, it was under no obligation to transport these goods from New Orleans to St. Louis, not having expressly contracted to do so. We do not regard the evidence of the arrangement between the defendant and Wyman, whereby the latter was to pay commissions to Wyman upon goods which Wyman might cause to be consigned to the defendant for transportation, as an agreement to carry in any event any goods which Wyman might thereafter consign to them. We do not think that the arrangement which the evidence shows to have existed between the defendant and Wyman amounted to anything more than an agreement on the part of the defendant with Wyman to pay Wyman a commission upon all goods which the defendant might carry which should be consigned to it through the influence of Wyman. We do not think it amounted to an agreement with Wyman that they would not go out of business as common carriers at any time they might choose, and that, although they might cease business as common carriers, they should be bound to carry any goods which might thereafter be tendered to them on consignment procured by Wyman. While agreeing with the learned counsel for the plaintiff that a bill of lading of goods is, for many purposes, the symbolical representative of the goods themselves, we do not think that the mere receipt by mail of the

Digitized by Google

bill of lading of the steamer Charrington of these goods by Messrs. Seligman, Hellman & Co., the defendant's agent at New Orleans, while the defendant was engaged in the business of a common carrier, was equivalent to a receipt of the goods as a common carrier in such a sense as obliged the defendant to transport the goods to their destination at St. Louis, and to assume the risks of a common carrier in such transportation. Neither do we accede at all to the position taken by the learned counsel for the defendant, that at the time these goods arrived in New Orleans, namely, about the 20th of September, 1881, the agency of Seligman, Hellman & Co. for the defendant had been revoked. The record abounds in evidence to the contrary. The telegram of the 10th of September, was not a revocation of their agency, but merely a direction as to how they should proceed to close out the unfinished business of the defendant. The failure to revoke the power of attorney given to Bennett, who was an employe of their New Orleans agents, Seligman, Hellman & Co., indicates a purpose to allow the agency of Seligman, Hellman & Co. to continue so long as should be necessary for the purpose of closing out and winding up the defendant's unfinished business at New Orleans. Then, as late as October, the defendant, in correspondence with the plaintiff touching this shipment, refers to Seligman, Hellman & Co. as their agents. But this question really does not arise upon the record, because the court took the view, as appears from the declaration of law given, that Seligman, Hellman & Co. were, at the time of the arrival of the goods, the defendant's agents.

It will be perceived that the case is made to turn in the opinion of the learned judge upon two views: —

1. That the defendant received the goods, not in the character of a common carrier, but in that of a forwarder.

2. That having received them in the character of a forwarder, it exonerated itself from liability to the plaintiffs

Digitized by Google

by the exercise of good faith in the premises. We think that neither of these propositions is the law.

1. We think that the defendant received these goods as a common carrier of bonded goods. Unquestionably the goods were tendered to the defendant in this character, and we take it that where goods are tendered to a party in one character, which raises certain duties and liabilities in respect of them, he can not, without the knowledge or consent of the person making the tender, receive them in a different character. This conclusion is so obvious that no other reason need be given for it, than the reason which the appellant's counsel has suggested to us, that it takes two persons to make a bargain. Having then received these goods in their character of carriers of bonded goods, and, being notified by the bill of lading, that they were to be transported in bond, they were bound to transport them in bond if they transported at all; and the taking of them out of bond, and the shipping of them on an unbonded vessel was in law a conversion, and they are liable as matter of law to the plaintiffs for the damages they have sustained. Ang. on Car., sect. 431.

But whether we call it a conversion, or use some other term, the liability of the defendant is the same; for the rule is that the carrier must carry the goods according to the contract. If he engages to carry them by land, he can not carry them by water; nor by water, if he engages to carry them by land; nor by a sail vessel, if he has engaged to carry them by a steam vessel; nor by a particular vessel, if he has engaged to carry them by another vessel. And if in any of these particulars he assumes to violate the shipper's instructions, he takes the risk of loss or damage; and the ground on which he is liable, is that he has not executed his contract with the owner. Hutch. on Car., sects. 314–316; *Goddard* v. *Mallory*, 52 Barb. 87; *Wilcox* v. *Parmalee*, 3 Sandf. 610; *Johnson* v. *Railroad Co.*, 33 N. Y. 610; *Goodrich* v. *Thompson*, 44

Digitized by Google

N. Y. 324; *Maghee* v. *Railroad Co.*, 45 N. Y. 514; *Bostwick* v. *Railroad Co.*, 45 N. Y. 712; *Sleat* v. *Fagg*, 5 Barn. & Ald. 342. And when the particular boat upon which the carrier had engaged to transport the goods had gone out of service, even this was held no excuse for shipping them on another boat, for "it was the duty of the defendants to notify the plaintiffs of that fact and await their instructions." *Johnson* v. *Railroad Co.*, *supra*. And that was the duty of the defendant in this case. And, while on seeing from the bill of lading, that the goods were to be shipped in bond, and not having the means of so shipping them, the defendant might have declined the service, yet having undertaken it, it took upon itself the obligation of shipping them according to its terms, and is liable for the damages which the plaintiffs have sustained by its failure to do so. *Maghee* v. *Railroad Co.*, *supra*.

2. But if we take the lower view, that the defendant received these goods as forwarders, we are still of opinion that they did not exonerate themselves by the mere exercise of good faith towards the plaintiffs in the premises. A man who assumes, for a reward, or otherwise, to act for others in a given capacity which implies professional or business knowledge, skill, and judgment, impliedly engages that he will bring to the performance of the duty which he so undertakes that degree of professional or business skill, knowledge, and judgment, which is usually exercised by good undertakers in that particular profession or business. He engages to do more than merely to exercise good faith. He engages to exercise the *diligentia patris familias* of the Roman law, which means the good business skill and diligence which the particular business, or the particular situation requires. Whar. on Neg., sects. 435–478.

Applying these principles of law to the case of a common carrier who habitually holds himself out as a carrier of bonded goods, it is difficult to see how such carrier can plead, in the light of the evidence contained in this record,

Digitized by Google

an ignorance of the damage which is done to the salability of wines by shipping them out of bond. The law obliges him to know what competent men engaged in his business generally know; and if he take a step, with or without this knowledge, in violation of the instructions of the owner of the goods, which step entails substantial loss upon the owner, he is bound to make good such loss. The most that can be said for the defendant's side of the question, upon the assumption that they received the goods in the character of forwarder is, that it would be a question for a jury whether, in doing what they did, under the circumstances disclosed by the evidence, they exercised the good business knowledge, skill, and diligence which belong to that character.

But we rest our judgment upon the ground that they received the goods as carriers, in which character the goods were tendered to them, and in which character the action has been brought against them; that they received them as carriers of bonded goods, knowing that they were to be shipped in bond; that by taking them out of bond and shipping them upon an unbonded vessel, they became liable to the plaintiffs as for a conversion, although they may have acted in good faith in the premises. The judgment must accordingly be reversed and the cause remanded. It is so ordered. All the judges concur.

---

14 294
38 31
39 671
14 294
42 12
14 294
44 435
14 294
61 440
62 17
14 294
67 480
14 294
95 141

STATE OF MISSOURI, EX REL. CHARLES J. BLAKE, Respondent, *v.* S. C. CABANNE ET AL., Appellants.

November 6, 1883.

CHATTEL MORTGAGE — DESCRIPTION — EVIDENCE. — A description of property conveyed by a chattel mortgage is sufficient if it can be identified by a third person upon reasonable inquiry, and oral testimony in aid of the description is admissible.

Digitized by Google

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

R. W. GOODE and M. W. HUFF, for the appellants.

L. J. SMITH, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action on an indemnifying bond given in an attachment suit before a justice of the peace. The relator claimed the property as the assignee of a chattel mortgage. The mortgage, when offered in evidence, was objected to on the ground that it did not contain a sufficient description of the property to impart notice to a subsequent creditor under the statute relating to mortgages of personal property. Rev. Stats., sect. 2503. The court overruled this objection and the propriety of this ruling is the only question in the case.

The property is described in the mortgage as follows: "The following goods and chattels now situated and being at No. 1009 Chestnut Street, St. Louis, Missouri, namely: four bed-room sets of furniture, four mirrors, four chamber sets, all the kitchen utensils, such as stove, stoveware, tin-ware, ironware and kitchen furniture, such as tables, chairs, etc., thirteen pictures, one hundred and seventy-five yards of carpeting, one full set of dishes, knives, forks, cups, saucers and all of the remaining tableware whatsoever, three lounges, lace curtains, window shades, rugs, mats, bedding, mattresses, sheets, pillows and covers to beds as above named, together with all and every other piece of personal property or household furniture or furnishing situated at the above named house." The property as described in the indemnifying bond which conforms without substantial variance to the description in the levy and in the claim was as follows: —

"One full M. P. French dresser chamber set, one ward-robe (glass door), 2 pair lace curtains, 9 pictures, 1 brown rep parlor suit, 7 pieces, 1 mattress, 1 pair springs,

Digitized by Google

1 bolster, 2 pillows, 2 comforts, 1 large round top marble table, 1 small round top marble table, 1 mirror, 1 large hall-tree, of the value of one hundred and thirty-one 50/100 dollars." It will be perceived that when this mortgage was given, the property was situated in the house 1009 Chestnut Street, St. Louis. But when the levy was made, the mortgageor, Lilly Williams, had removed from that place to No. 105 North Tenth Street. The designation in the mortgage of the house in which the mortgaged property was situated was undoubtedly a material part of the description, but the validity of the mortgage was not impaired by the removal of the property to another house (*Fuert* v. *Rowell*, 62 Mo. 524; *Wheelden* v. *Wilson*, 44 Me. 11), provided the description, excluding the statement of the house in which the articles were situated at the time of the mortgage, was otherwise sufficiently definite. Upon the question what descriptive terms are sufficiently definite in a chattel mortgage to render the instrument valid as against subsequent creditors or purchasers, we can find no direct authority in this state.

It is quite clear that descriptive words which might be sufficient as between the mortgageor and mortgagee might be wholly insufficient in a contest between the mortgagee and a subsequent creditor or purchaser of the mortgage, as was suggested by Hough, J., with reference to the descriptive words in a deed conveying land. *Gatewood* v. *House*, 65 Mo. 663. But from the nature of the case, personal property can not be described in a deed of conveyance with the same accuracy as real estate. In many, indeed in most cases, it is impossible to describe such property so that it can be identified from the terms of description employed without the aid of extrinsic evidence. Accordingly, it is well settled that a description of the property conveyed in a chattel mortgage is sufficient if it will enable a third person to identify the property after reasonable inquiry; and further, that in legal proceedings, when the inquiry is

Digitized by Google

whether particular property was intended to be embraced in such an instrument, parol evidence is admissible to aid the descriptive terms there employed. These principles are laid down and illustrated at length in a recent valuable work on chattel mortgages (Jones Chat. Mort., sects. 53–77); and it is quite clear from the illustrations there given, that the description in this instrument was sufficient. The court, therefore, committed no error in admitting it in evidence, and the judgment is accordingly affirmed. All the judges concur.

---

14 297
37 348

14 297
47 675

14 297
123m 51
57 198
57 204

14 297
159s 200

14 297
97 s218

14 297
101 s125
d177s1374
c177s4376
c177s 877
c177s4888

STATE OF MISSOURI, EX REL. JOHN W. CAMPBELL *v.* POLICE COMMISSIONERS ET AL., Respondents,

November 6, 1883.

1. POWER OF POLICE COMMISSIONERS. — The power of the police commissioners of St. Louis to appoint a chief of police "for such time as the board shall determine" does not include the power to discharge and appoint a chief of police at their pleasure.
2. —— An appointment of a chief of police without specifying the duration of the term is not void and the commissioners can not remove such an appointee at their pleasure.
3. —— A chief of police can not be removed by the commissioners before the expiration of his term of office, except for specified causes.
4. CHIEF OF POLICE — TERM OF OFFICE. — The statutory limitation of the term of office of a chief of police is four years where the term of his tenure is not otherwise fixed by the order of his appointment.
5. —— PRESUMPTIONS — CERTIORARI. — In proceedings by *certiorari* it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown.
6. —— PRACTICE. — In such a proceeding such a record will be quashed.

WRIT of *Certiorari.*

Record quashed.

HENRY HITCHCOCK, for the relator: In a proceeding by *certiorari*, the only question is, whether there is error in the record of the inferior tribunal brought up by the writ.

Digitized by Google

Nothing outside of the record can be considered for the purpose of determining that question. — *The State ex rel.* v. *Powers*, 68 Mo. 323; *Hannibal, etc., R. Co.* v. *State Board*, 64 Mo. 308. If want of jurisdiction or irregularity appears from the record of the proceedings below they will be quashed. — *Owens* v. *Andrew County*, 49 Mo. 372; *The State ex rel.* v. *Dowling*, 50 Mo. 136; *Mullins* v. *The People*, 24 N. Y. 399 (affirmed 40 N. Y. 154); *Gambling* v. *Cholwell*, 6 Abb. Pr. 151. Where a statute requires that a removal from office must be "for cause," it necessarily implies that the "cause" must be "some dereliction or general neglect of duty or incapacity to perform the duties, or some delinquency affecting his general character and his fitness." — *The People ex rel.* v. *The Fire Commissioners*, 72 N. Y. 445–449; *The People ex rel.* v. *Nichols*, 79 N. Y. 582–588; *Murdock* v. *The Trustees*, 12 Pick. 244, 263; 1 Dillon on Mun. Corp. (3d ed.), sects. 250, 253, 255. Statutes conferring upon inferior tribunals a power even of summary proceeding, are to be strictly construed, "and will not be held to deprive one of a regular trial by due course of legal proceedings if any other construction can be given them." — *Owens* v. *Andrew County*, 49 Mo. 378; *The People ex rel.* v. *The Mayor*, 19 Hun, 441; 1 Dillon on Mun. Corp., sect. 253.

JOHN G. CHANDLER, for the relator: The removal must be for cause. — *Ex parte Nichols*, 57 How. Pr. 395; *The People* v. *Cooper*, 57 How. Pr. 416; 19 Hun, 441; *The People* v. *The Fire Commissioners*, 72 N. Y. 445; *The People* v. *The Board of Police*, 39 N. Y. 506. "The proceedings of trial and dismissal of members of police force should show regularity beyond doubt." — *Gambling* v. *Cholwell*, 6 Abb. Pr. 151. In proceedings by *certiorari* the court can not look beyond the record certified. — *The State* v. *Powers*, 68 Mo. 320; *Emery* v. *Brann*, 67 Mo. 39; *Hannibal, etc., R. Co.* v. *The State Board*, 64 Mo. 294; *The People* v. *The Board of Police*, 69 N. Y. 39.

Digitized by Google

KRUM & JONAS, for the respondents: The power of removal is incidental to that of appointment where the tenure of office is not fixed.—*The People ex rel.* v. *Higgins*, 15 Ill. 110. And the cause of removal need not be assigned.—*Keenan* v. *Perry*, 24 Texas, 259; *The People* v. *Stout*, 19 How. 171.

LEVERETT BELL, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

The return upon a writ of *certiorari* issued from this court and directed to the police commissioners of the city of St. Louis and each of them, by name, contains "a full and complete transcript of the records and proceedings of said board, touching the removal of John W. Campbell as chief of police." From this transcript it appears that on June 8, 1881, the resignation of James McDonough, as chief of police, was tendered and accepted, and Captain Ferd. B. Kennett was appointed to the same office, "from and after said date." No term of service was annexed to this appointment, nor was there any in the cases of those which followed. That on August 8, 1882, Kennett's resignation was tendered and accepted, and, upon an election held to fill the vacancy, John W. Campbell was "declared duly elected chief of police of the city of St. Louis." That on April 10, 1883, at a regular meeting of the board "on motion John W. Campbell was continued chief of police." That on October 9, 1883, the board, by a majority vote, adopted a resolution in these words: "*Resolved*, That the order of the board of April 10, 1883, continuing John W. Campbell as chief of police, be and is hereby rescinded, and that the office of chief of police be declared vacant." The return contains also a copy of rule 5, of the standing rules or by-laws of the board, as follows:—

"Charges against members of the police force must be submitted in writing, and when not preferred by a commissioner, the chief of police, a captain or sergeant, they must

Digitized by Google

be certified by the affidavit of the complainant or informer."

If, as the relator claims, the resolution of October 9, 1883, was adopted without authority of law, and in violation of express legal provisions, that action of the board must be adjudged void, and its attempted removal of the relator from his office, a nullity. The whole issue before us must be determined by an application of the tests of law to the face of the proceedings, as they appear in the return.

The statutory provisions now in force and deemed material to the present inquiry are the following: Section 2, Chapter VI., of the laws specially applicable to the city of St. Louis, Revised Statutes, page 1528, establishes a board of five police commissioners, whose official tenure and duties are defined in that and succeeding sections. The law proceeds: —

"SECT. 6. To enable the said board to perform the duties imposed upon them, they are hereby authorized and required, as speedily as may be, to appoint, enroll and employ a permanent police force for the city of St. Louis, which they will equip and arm as they may judge necessary. * * * The policemen shall be employed to serve four years, and be subject to removal only for cause, after a hearing by the board, who are hereby invested with exclusive jurisdiction in the premises. Any policeman whose term of service shall expire, and who, during his appointment, shall have faithfully performed his duty, shall, if otherwise qualified, be preferred by the board in making their new appointments.

"SECT. 7. The officers of police shall be as follows: One chief of police, who shall give bond with security in the penal sum of $20,000 for the faithful performance of his duties; three captains, three lieutenants, not exceeding twelve sergeants and four turnkeys; they shall be appointed by the board for such time as the board shall determine, and be subject to removal by the board for cause."

Digitized by Google

"SECT. 11. The board of police are hereby authorized to make all such rules and regulations, not inconsistent with this act, as they may judge necessary for the appointment, employment, uniforming, discipline, trial, and government of the police." * * *

Section 2, of the same act, contains the following provision: "Before entering upon the duties of their said office the said commissioners and the said mayor shall take and subscribe before the judge of the circuit court of St. Louis county, or the clerk thereof, the oath or affirmation prescribed by the constitution of the state of Missouri, and shall also take and subscribe before the same judge or clerk the further oath or affirmation that, in any and every appointment or removal to be by them made to or from the police force created and to be organized by them under this act, they will, in no case and under no pretext, appoint or remove any policeman or officer of police or other person under them on account of the political opinions of such policeman, officer or other person, or for any other cause or reason than the fitness or unfitness of such person, in the best judgment of said commissioners, for the place to which he shall be appointed or from which he shall be removed."

For the relator it is assumed that, under these statutory provisions, the board had no lawful authority to remove the chief except "for cause," that is for some cause touching his fidelity or capacity or fitness or unfitness to hold the office and discharge its duties. That, inasmuch as the record of proceedings does not show that any such cause existed, or was even alleged or pretended, it results as a legal conclusion, that the removal was made or attempted without cause and was therefore void. For the commissioners it is contended that the power to appoint "for such time as the board shall determine" is equivalent to a power of investiture during the pleasure of the board. That the words "subject to removal by the board for cause," do not convey an exclusive intendment, but are

Digitized by Google

cumulative of a power, coupled with a duty of removal, additional to that which may be exercised upon mere volition. That, even if this be not the meaning of the statute, the fact that the office was conferred upon the relator, without any specification of its term or duration, made it an appointment for and during the pleasure of the appointing power, and the removal was therefore valid, whether any cause existed or not.

It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint. If the law provides a term for the incumbency, this will supersede the incidental power of removal during the continuance of the term. If, notwithstanding the term, provision is made for a removal upon certain conditions, or for certain reasons, there can be no valid removal pending the term unless such conditions or reasons appear, either presumptively or otherwise. This is the substance of numerous adjudications which the industry of counsel has collated in aid of our inquiry, and all of which have been carefully examined.

It is of the first importance, therefore, to ascertain what was the tenure or term, if any, to the relator's official position, at the moment when the resolution declaring it vacated was adopted. If anything was vested in him by virtue of the previous acts of the board, it was the office of chief of police, in all completeness, with its entire tenure, duration, rights, and immunities, whatever these might be, as they were defined by the law of its creation. It was not in the power of the board to annul or abridge them, if his appointment was valid. That it was so, the defendants do not deny, nor could they be permitted to stultify themselves by so doing. As they could not make of the officer anything less than the law declared him to be, when once invested with the official title, we must look, for the object of our inquiry, to the

Digitized by Google

law rather than to the forms or the omissions of form by which the board effected his induction into the office. We may, therefore, ignore, for every purpose in this connection, the board's failure to fix a term, or "time" for the relator's incumbency. That was a failure to perform a duty plainly enjoined by law, and could not add anything to their power over the officer or the office. It would be monstrous to assume that a refusal to discharge a duty can invest the recalcitrant with any lawful power or authority which would be denied him if he performed it.

An idea that the statutory powers given to the commissioners are equivalent to a direct authority to terminate an official service at pleasure, seems to grow out of a misconception of the language employed. If it were the actual service which the board is empowered to "determine," there might be some propriety in attaching to the word used a signification of closing, concluding, or ending, instead of that one more commonly understood, which implies a fixing, settling, or deciding upon. But the time, which "the board shall determine," is coupled with the appointment, and not with the service. To determine this "time" as directed, is to fix, settle, or decide what it shall be, as an *addendum* qualifying the effect of the appointment. In this relation, it becomes a time necessarily prospective and future. The clear intent of the command is, that the board shall annex to the appointment a time, term, or period, through whose duration the consequent duties, privileges, and emoluments are to remain with the appointee. This is the obvious and only English meaning of the words themselves. But if there were any ambiguity or uncertainty about them, the manifest policy of the statute, conspicuous in almost every line, would be conclusive of the same interpretation.

Does it appear in the legislative policy that the position of chief of police (and of the other officers) is to be one having a defined or definable term, or "time;" or that it

Digitized by Google

is to be only an existing occupancy, whose duration must cease whenever it is so willed by the commissioners? The distinctly expressed purpose of the legislature is to secure to the inhabitants of a large city the amplest protection of their lives and property that can be found in a police system. The strongest incentives to manliness, faithfulness, and efficiency in the force are carefully provided for, and nowhere do these incentives appear more notably than in the guaranties of permanent employment to those who shall merit it by a faithful performance of duty, and the experience which comes of long service. They are not to be removed on account of political opinions, or for any other cause or reason than for unfitness.

The policeman, being appointed for four years — the full term permitted by the constitution — may be removed "only for cause, after a hearing by the board;" and, having been faithful during his term, "shall, if otherwise qualified, be preferred by the board in making their new appointments." Here, the public servant is made to know that his position is not only assured for a definite term, but will also be extended beyond it, if his service be true. It is inconceivable that the law-maker could have contemplated holding out these strong incentives of definiteness and permanency to the privates, and yet not have found any reason for extending like incentives to the officers who were to control them, and in whom trustworthiness was of greater public necessity. Reasons may have been thought possible, why the board, if permitted, might wisely make the "time" tenures of the officers different from that which was common to the privates; and so the permission was given. But it would be an extraordinary performance to find in this so enormous a departure from the pervading policy of the enactment as should leave the officers' tenures liable to be cut short in any moment of unreasoning caprice. There was no such departure. The officers' tenures, like the privates', are not to remain undetermined. "The board

Digitized by Google

shall determine" them. If, as we think, these considerations show that the office of chief of police, as intended by the statute, is an office with a term, and not a tenancy at will, our conclusion can suffer no detriment from the fact that the legislature, instead of declaring the length of the term, directed it to be determined by an agency especially empowered so to do.

This emphasis upon the term, or "time," is not weakened by the next following provision. It would be superfluous, to say the least, to subject the officer to "removal by the board for cause," if the board could remove him at pleasure, whether for cause or no cause. A very familiar maxim of interpretation excludes all idea of such an unmeaning duplication of power: *Expressio unius est exclusio alterius.*

Counsel undertake to show a parallel between this provision that the officers of police shall be "subject to removal by the board for cause," and section 7, article XIV., of the state constitution as interpreted by this court in *The State ex rel.* v. *Hermann* (11 Mo. App. 49). There is no semblance of a parallel. The sole and distinctly expressed purpose of that section is to lay a cumulative duty upon the legislative department. "The general assembly shall, in addition to other penalties, provide," etc. The statutory provision before us says nothing about what the board shall or shall not do. All this is left to the regulations elsewhere, and to general principles. The form of the constitutional command forbids an application of the maxim *expressio unius*, etc. The only way to make the statute resemble it would be by inserting words so that it would read "in addition to removal at the pleasure of the board, the officers shall also be subject to removal by the board for cause." Surely counsel would not so mar the legislative rhetoric. But the duplicative words are not present, and the maxim applies.

It is insisted, however, for the commissioners, that, whatever might be the operation of the statute, if they had

Digitized by Google

given effect to it by defining the term of the chief's appointment, yet, as the case stands, their omission to do so leaves the relator without any official tenure, save the will of the board, who may therefore terminate it at their pleasure. We have already mentioned a conclusive reason why this argument can not be entertained. If the board, whether intentionally or otherwise, may thus create a chief of police with an official tenure not recognized by the law from which they derive their authority, but in fact forbidden by it, they may, in plain terms, repeal the statute and enact a law of their own. Upon this theory, the defendants' return would show that, for more than two years past, the citizens of St. Louis have been deprived of their rights to a chief enjoying the guarantee of a definite term, and so far secured against degrading influences that might threaten his position, and in place thereof, there has been thrust upon them a puppet, subject to dismissal by the commissioners whenever so inclined, whatever may be his faithfulness, competency, and thorough fitness for the office. All this the defendants have done, in direct and inexcusable violation of law, if their own theory of legal results is to be accepted. But, fortunately for them, their theory is wrong. There seems good reason for supposing that the law will not impute to them so gross a dereliction when it may presume, instead, that in declining to annex a "time" to the relator's appointment, they left it to be determined by the constitutional limitation of four years. We are not to be understood, however, as judicially deciding that this presumption exists. The question is not submitted to us in this proceeding. We have nothing to do with the future of the relator's position. We refer to the possible presumption, only to show that there are means by which the law may vindicate its own supremacy, rather than accept the virtual dethronement offered by the commissioners. The presumption might serve also as a foil to the inadmissible suggestion that the relator's appointment was void, for lack

Digitized by Google

of the specific term which the law required the commissioners to fix. At the same time, his *de facto* incumbency, and its recognition by them, raise an independent presumption of regularity in his appointment, which the defendants are estopped to deny.

It may be added, in this connection, that we can not admit the proposition of counsel that, if the commissioners should fix an official term at four years, they might, nevertheless, "in one month, abridge the tenure to one year." The, term, when once designated by the board, becomes the legal term for that appointment, and their authority over it, as such, is exhausted. No authority is given them to shorten it. To do so, would be, in effect, a removal without cause.

A law, prescribing an oath that the affiant will do a particular thing, means nothing, if not a legal obligation to do that thing. It is not to be supposed that the law will require a man to swear that he will do what it does not intend that he shall do. The oath prescribed for the commissioners, that they will not "appoint or remove any policeman, or officer of police, or other person under them, * * * for any other cause or reason than the fitness or unfitness of such person * * * for the place to which he shall be appointed, or from which he shall be removed," is not only a distinct declaration of what shall be necessary to constitute a cause for removal, but is also a direct command that there shall be no removal without such cause. We are flooded with citations of authorities to the effect that where a power is expressly given to remove for cause — whether the cause be defined or left to inference — this implies that there shall be no removal without such cause. But there is no need for either authority or implication in the presence of a statute so explicit. It announces in plain words the exact prohibition which the authorities in other cases find implied. Term or no term of office, it forbids the removal without the specified cause, in any and every case, whatever may have been the form or the terms of the

Digitized by Google

board's appointment. In the absence of such cause the officer will fill out his term if there be one. If there be no term declared, the constitutional limitation of four years will furnish a conclusive answer to the objection that, without a right of removal by the board, he might hold his office for life. Legislative acts must always be construed with a reference to existing constitutional regulations on the same subject.

But it is contended for the defendants that even if it be understood that they could not lawfully remove the relator without cause, yet he can gain nothing thereby in this proceeding, because there is a legal presumption that the commissioners found a sufficient cause, proved to their satisfaction, and, no appeal from their decision being provided for, the judicial discretion exercised by them can not be reviewed. As to their judicial discretion it does not appear that they exercised any. They decided no question of fact. They simply put forth an effort of personal will. It may be admitted, as far as this case is concerned, that, if it could be gathered from their record that they had heard any competent evidence of an existent cause for removal, their verdict upon the issue of fact should not be questioned. The broadest adjudications to this effect, however, require that there must have been as much legal evidence as would justify a court in submitting the issue to a jury. *The People ex rel.* v. *Fire Commissioners*, 72 N. Y. 445; *The People ex rel.* v. *Mayor*, 10 Hun, 441; *The People* v. *Campbell*, 82 N. Y. 255; *The People* v. *Board of Police*, 39 N. Y. 506; *Osgood* v. *Nelson*, 5 L. R. H. L. Cas. 636. But the commissioners' record fails to show that they heard sufficient evidence, or any evidence, or that any issue was in fact, raised or considered.

This, as will presently appear, is conclusive that there was no such hearing, evidence, or issue; and that therefore there was no judicial hearing, action, or decision to claim exemption from review. The only question is, whether the

Digitized by Google

commissioners, in what they did, acted within their jurisdiction.

Counsel for the defendants refer us to a number of decisions which they regard as sustaining the doctrine that where an officer has power to remove for cause, and nothing appears to show whether there was cause or not, it will be presumed from the act of removal that he first satisfied himself by sufficient evidence, and then decided that the competent cause did exist; wherefore his decision must stand, as not being subject to review by any other authority. Such seems to be the effect of the decisions in *Keenan* v. *Perry* (24 Texas, 253), and *The State* v. *Doherty* (25 La. Ann. 119). But an important distinction makes it quite clear that these cases are no authority for the matter here in hand. In each of them it was the governor of a state whose action, in the discharge of his constitutional executive functions, was criticised. In another case (*McElrath* v. *United States*, 102 U. S. 426), it was the president whose executive proceedings were called in question. A well understood presumption, in such cases, rests upon fundamental principles. Our national and state governments are constituted in three equal and co-ordinate departments, legislative, executive, and judicial, each being supreme within its constitutional sphere. No one of them has any authority to review, reform, or set aside the action of another, when done within its organic line of duty. Hence, it is never to be assumed, without conclusive proof of the fact, that either department, while acting through its visible representative, upon a subject-matter within its proper province, has usurped an unlawful authority, and transcended its constitutional limitations. As a correlative proposition, the contrary will always be presumed until disproved by positive testimony.

A familiar illustration of this rule appears in the presumption of interpretation, among others, that the legislature in adopting a statute intended a meaning within the

Digitized by Google

bounds of its constitutional authority to pass laws; so that ambiguous or uncertain terms will always be construed with reference to this presumption. Other illustrations appear in the frequent presumptions of lawful procedure, where the records are silent, by courts of record, which are the visible representatives of the judicial department. The governor is the chief exponent of the executive department, and the same sort of credence is extended to his official acts. *Attorney-General* v. *Brown*, 1 Wis. 513; *Hartranft's Appeal*, 85 Pa. St. 433. Hence, in *The State* v. *Doherty* (*supra*), where the governor had authority to remove a tax collector for "refusing or failing to do his duty," there was good reason for holding that "when the governor removed the defendant and appointed the relator, he decided that the defendant had failed or refused to do his duty, because it was in this contingency only that he had the right to remove him. The court said, further, that, "to institute the inquiry as to the correctness of the cause for which the governor removed the defendant, would be a direct attack upon the independence of the executive, and a usurpation of power subversive of the constitution." The other two decisions mentioned, so far as they touch the precise point here under consideration, were controlled by similar views of the executive authority.

But in the case of inferior judicatories and depositories of specially delegated and limited powers, the rule is universally the opposite. As to them, "nothing shall be intended to be within the jurisdiction that is not expressly averred so to be. So, that if the proceedings * * * fail to show that which was necessary to confer jurisdiction, the whole is an absolute nullity." *The State ex rel.* v. *Cohen*, 13 S. C. 201; *Devall* v. *Taylor*, 1 Cheaves, 5; *The People ex rel.* v. *Board of Police*, 6 Abb. Pr. 162; *The People ex rel.* v. *Cholwell*, 6 Abb. Pr. 151; *Owens* v. *Andrew County Court*, 49 Mo. 372. Said the New York supreme court, in *The People ex rel.* v. *Board of Police*

Digitized by Google

(35 Barb. 536): "It is no part of the duty of this court to uphold an exclusion from office by intendment where we are not certain that the existing facts would and ought, in right and justice, to produce a judgment of exclusion or removal by the competent authority." It results from the rules so universally accepted, that the absence of any showing in the commissioners' record of a cause for the removal of the relator in this case, or of any adjudication by them upon any evidence of such cause, must be treated as conclusive that no such cause existed, and that there was no such adjudication. The essential conditions being absent, the board had no jurisdiction to vacate the relator's office.

Many decisions are referred to by the counsel on both sides in support of their respective views. To review them in detail would require more space than can be given to this opinion. We have examined them all carefully, and find the overwhelming weight of their authority in harmony with the principles which compel the conclusions we have reached. Some departures there are in matters of detail or of special application; but they are wholly immaterial here, in view of the peculiar aspects of the present case and of the statutes which must control it.

So much of the resolution of October 9, 1883, as rescinds the order of April 10, 1883, requires no attention. The rescinded order was inoperative for any purpose, unless as a mere commendatory expression touching the manner in which the person mentioned was performing his duties. He was already in office by virtue of the original appointment, and without that order would have continued to be so all the same. There is no authority for supposing that his incumbency was prolonged by force of that order. He held by a better title, and does not appear to have had any hand in the making of it. So much of the same resolution of October 9, 1883, as declares vacant the office of chief of police, is reversed, quashed, and annulled. All the judges concur.

Digitized by Google

14 312 / 38 687
14 312 / 65 183
14 312 / 84 627

S. C. CABANNE, Appellant, *v.* JAMES J. SPAULDING ET AL., Respondents.

November 20, 1883.

1. EXECUTIONS — UNLAWFUL DETAINER. — Execution may properly issue for damages and costs upon the judgment of a justice in unlawful detainer, after restitution of the premises.

2. JUDGMENTS — JUSTICES OF THE PEACE. — That a judgment is entered by a justice's clerk is immaterial if entered in the name and by direction of the justice.

3. UNLAWFUL DETAINER — JUSTICES — COMPLAINT. — A complaint in unlawful detainer before a justice, substantially of the form given at page 780 of the Revised Statutes is sufficient.

4. AMENDMENTS. — A proposed amendment of a petition to conform to the proofs is properly refused when offered after the dissolution of an injunction.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

R. W. GOODE and M. W. HUFF, for the appellant, W. C. MARSHALL, of counsel.

EBER PEACOCK and W. M. KINSEY, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

The defendant, Charles Bauer, obtained judgment before a justice of the peace against the plaintiff in this proceeding, in an action of unlawful detainer. An appeal was taken to the circuit court wherein the appeal was dismissed. Before this dismissal, Cabanne, the defendant in that proceeding, surrendered the premises in dispute, and took a lease with the knowledge and consent of Bauer, from J. P. Carr, who had become Bauer's lessee. After the dismissal the justice issued an execution in ordinary form, for restitution of the premises, and for damages, costs, and rents, and placed it in the hands of the present defendant, Spaulding, as constable. In this action the plaintiff seeks a perpetual injunction, restraining the defendants from enforcing

Digitized by Google

the execution. A temporary injunction was granted in the first instance. This, after a full hearing, upon motion, was dissolved, and final judgment was rendered for the defendants.

The plaintiff contends that no execution could properly issue on the justice's judgment, after restitution of the premises. This is equivalent to saying that if part of a judgment be satisfied, there can be no execution for the remainder. There is nothing in the point. The execution here was in statutory form, for restitution and for damages, rents, and costs. Rev. Stats., sect. 2440. The cases cited, which show that a judgment is an entirety and must stand or fall in all its parts, are not relevant. Nor are those which hold that, after judgment, any change in the relations of the parties that would have prevented a recovery of judgment, is a bar to any enforcement of such judgment. There was no change in the relations of the parties in this case as to the damages, rents, and costs. If there were any force in the arguments presented on these points, it would result *mutatis mutandis*, that a defendant in unlawful detainer need only satisfy the damages and costs adjudged against him in order to prevent any enforcement of restitution. Such is not the law. There was no attempt in this case to compel restitution. The positive and uncontradicted testimony was that the officer was specially instructed to make none. *The State to use* v. *Weinel*, (13 Mo. App., 583), simply holds that a judgment in forcible entry and detainer should not be enforced within the time allowed for an appeal, and has no application to the present case.

It is objected that the justice's judgment was void, because he did not enter it in the docket with his own hand. The entry was made, under the justice's direction, by his clerk. This did not make it the clerk's judgment, as counsel seem to suppose. The mental act of deciding the issues was performed by the justice. If he could not law-

Digitized by Google

fully cause the result to be written down by another, it would follow that a man without arms, and therefore physically unable to write, would be disqualified for the office of justice of the peace. We have never heard of such a disqualification. The objection is without the least merit.

The plaintiff complains of certain alleged defects and omissions in the complaint filed with the justice. The complaint, as it appears in the record, alleges every fact that the statute requires, and states specifically the situation of the premises, so as to show that the justice had jurisdiction. Rev. Stats., sect. 2420. It substantially follows the form given in Revised Statutes, at page 730, which form has always been considered sufficient in this state. If the Illinois decisions cited were directly in point, they would weigh nothing against the statutory authority for the complaint as filed.

There was no error in the court's refusal to allow an amendment of the plaintiff's petition by adding new allegations in supposed conformity with the proofs introduced. The application was made after the dissolution of the injunction, and was not authorized by Revised Statutes, section 3567, which permits such amendments only before final judgment. It could not be made after the judgment, under section 3570, because the proposed amendment was not to be in affirmance of the judgment, but in derogation thereof.

Finally, many of the alleged irregularities of which the plaintiff complains, consist of supposed errors in the proceedings which he would have the court restrained by injunction. They are not available for his purpose because of Revised Statutes, section 2709. "Every such injunction shall operate as a release of all errors in the proceedings that are prayed to be enjoined."

The judgment is affirmed. All the judges concur.

Digitized by Google

H. MEINCKE, Defendant in Error, v. W. BRACKSIECK, Plaintiff in Error.

November 20, 1883.

1. ATTACHMENT — COUNTER-CLAIM. — A defendant who, being sued by attachment for the purchase-money of a pair of mules, sets up that at the date of the suit the sheriff took from him two mules and delivered them to the plaintiff, does not state facts constituting a counter-claim.
2. —— Under such a state of facts, the mules being in the sheriff's custody, the defendant can claim nothing for their use.
3. JUDGMENT — EXECUTION. — In giving judgment for the plaintiff in such a case an order for a special execution against the attached property is proper, without making a specific order for each article.

ERROR to the St. Louis County Circuit Court, EDWARDS, J. *Affirmed.*

M. F. TAYLOR, for the plaintiff in error.

Z. J. MITCHELL, for the defendant in error.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sues by attachment on a promissory note for $300, given to him by the defendant in purchase of a pair of mules, a spring wagon, and some other articles of little value. The defendant answers, denying all the allegations in the petition except as to the giving of the note, and sets up, by way of counter-claim, that "on the 16th day of August, 1881, the sheriff of the city took from the possession of the defendant and delivered into the hands of the plaintiff, two brown mare mules and one two-horse covered wagon. That since the said dates, and up to the date of the filing hereof, the plaintiff has continuously had in his possession, and using and enjoying the benefit of said animals and wagon, and is liable in law to defendant for the use thereof." The matter thus set up does not constitute a counter-claim, within the terms of the statute. Rev. Stats., sect. 3522. It is not stated

Digitized by Google

as "arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." It is not stated that the mules and wagon are the same which were sold by the plaintiff to the defendant, and attached in this proceeding. If they were the same, however, the defendant would have no cause of action against the plaintiff, since the property was in the lawful custody of the sheriff, and the defendant, having no right of user for the time being, could claim nothing for its use by another. The plaintiff may have been an agent of the sheriff for the care of the property. But, whether he was so or not, his responsibility was to the officer only. It is not alleged that there was any damage or injury done to the property. If the claim be treated as an independent cause of action arising on contract, then it is no counter-claim under the statute, because it was not "existing at the commencement of the action." The petition was filed on August 15, 1881. The court below rightly disregarded the supposed counter-claim, and gave judgment for the plaintiff for the amount due on the note, with an order for special execution against the property attached.

Counsel for the defendant seems disposed to regard this special order as an enforcement of the vendor's lien, and argues hence that the court erred in making a general order covering the property in a lump instead of a specific order as to each separate article, with the purchase price thereof. If this were a case of vendor's lien, the law would not be as plaintiff claims. The property was purchased in a lump, at a lumping price for all, and no value was separately set on any article. But there is no vendor's lien in the case. Revised Statutes, section 2353, to which reference is made, simply intends that personal property, which would otherwise be exempt from sale under execution, shall not be so exempt, if the judgment be "against the purchaser for the purchase price thereof." The practical effect may or may

Digitized by Google

not be similar to that of a vendor's lien, according to circumstances. The special order, in this case, was made under the statute regulating proceedings in attachment. Rev. Stats., sects. 433, 435.

We find no error in the record and the judgment is affirmed. All the judges concur.

A. J. CASSATT, Appellant, *v.* J. C. VOGEL, EXECUTOR, Respondent.

November 20, 1883.

1. PRACTICE — TRIAL COURTS. — On demurrer the trial court does not look at exhibits not made a part of the pleadings.
2. —— APPELLATE COURTS. — The appellate court will not consider exhibits which were not before the trial court for consideration.
3. MORTGAGES — STIPULATIONS FOR INSURANCE — ACTIONS. — A *cestui que trust* who advances money to pay insurance under a stipulation in the deed of trust that he may insure the property upon the mortgageor's failure to insure, and that "the sums so expended, with ten per cent interest per annum thereon, shall become a debt due additional to the principal indebtedness," may proceed by an action for money paid out for the mortgageor at his instance, without waiting to foreclose the mortgage or for the maturity of the principal indebtedness.
4. —— EXECUTORS AND ADMINISTRATORS. — For advances so made by the beneficiary after the motgageor's death, the remedy is against the mortgageor's executor, who is bound to do that which his testator undertook to do.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and remanded.*

J. L. & F. P. BLAIR, for the appellant: It was error to consider the deed of trust. — *Chambers* v. *Carthels*, 35 Mo. 374.

BROADHEAD & HAEUSSLER, for the respondent: If the plaintiff has an action it is not against this executor. — *Whittelsy* v. *Brohammer*, 31 Mo. 98; *Sauer* v. *Griffin*, 67 Mo. 654.

Digitized by Google

Lewis, P. J., delivered the opinion of the court.

The amended petition sets forth, in substance, that the defendant's testator, in his lifetime, executed a deed of trust to secure a note payable to the plaintiff, in which deed it was covenanted and agreed on the part of the grantor "that the buildings standing on the real estate conveyed by said deed to the trustees, in said deed designated, should be kept insured in a sum of not less than $25,000, and that said insurance should be placed in a company, or in companies, satisfactory to and designated by said trustees, or either of them; * * * that, in case said insurance should not be taken out and kept up in the manner contemplated by said deed of trust, then said plaintiff might himself pay the necessary premiums for such insurance and that such premiums, so paid, should become a debt additional to the indebtedness described in said deed of trust and be held secured by said deed of trust, and should become due and bear interest at the rate of ten per cent per annum from the date of their payment. Plaintiff further states that, in April, A. D. 1881, the buildings on said real estate were insured in the sum of $10,000 in companies which were not satisfactory to nor designated by said trustees, or either of them. That the survivor of said trustees thereafter, to wit, on the 25th day of April, A. D. 1881, notified said Vogel, executor of said Bircher, as aforesaid, that said insurance was not satisfactory to him, the said surviving trustee, and requested him, the said Vogel, as said executor, to take out policies of insurance in the same amount in other insurance companies designated by said surviving trustee; which the said Vogel thereupon refused and still refuses and neglects to do. That thereupon, to wit, on the 25th day of April, A. D. 1881, said plaintiff caused said buildings to be insured, in the sum of $10,000, in companies designated by said surviving trustee, and paid, as premiums therefor, the sum of $145. That said insurance was taken out in lieu of said insurance of $10,000, disapproved of by said surviving trustee. That thereupon said plaintiff de-

Digitized by Google

manded of said Vogel as executor as aforesaid, the repayment of said sum of $145," etc. The defendant demurred to this petition as not stating facts sufficient to constitute a cause of action. The demurrer was sustained.

Counsel for the defendant argue that the action of the circuit court was right, because, according to the petition, the sums paid for premiums were to "become a part of the debt and bear interest," etc.; wherefore the liability arising, if any, would only mature with the debt of which it is a part, and nothing in the petition shows that this is now due, nor does it appear when it will become due. But counsel overlook the language used in the petition. The allegation is explicit, that "such premiums, so paid, should become a debt *additional* to the indebtedness described in said deed of trust, * * * and should become due and bear interest * * * from the date of their payment." So it is not true, so far as these averments are concerned, either that the liability for premiums paid was to be a part of the original debt, or that the date of its maturity is left in any uncertainty. The liability matured at the date of the payment, to wit, on April 25, 1881. No language could express this more clearly than that used in the petition.

The petition states that the insurance was to be placed "in a company or companies satisfactory to and designated by said trustees or either of them," by the terms of the covenant. The negative averment follows, that the insurance taken — by the defendant, or his testator — was "in companies which were not satisfactory to, nor designated by said trustees, or either of them." Nothing could be alleged on this point, to make out a better *prima facie* cause of action. If the trustees' dissatisfaction with the companies selected, or their refusal to designate them, was either unreasonable, oppressive, or whimsical and without cause, as counsel suggest, the objection if valid, would be matter of special defence, and there was no need to anticipate it in the petition.

Digitized by Google

Counsel should first read the pleadings they undertake to criticise, and not compel the court to consume time in correcting their misstatements of the averments. It is *not* "averred that the trustee took out other insurance," and hence no answer is needed to the objection that he had not power to do so. It is averred that "said plaintiff caused said buildings to be insured," etc., and this is precisely what, by the terms of the covenant, the plaintiff was authorized to do.

Equally unsound is the objection that the demand sued on is a charge against the realty, and therefore not to be maintained against the executor. The words of the covenant make it unquestionably a personal demand or claim for the payment of money—quite as much so as the note described in the same deed. Neither the one nor the other is any the less a personal demand, because its payment is, by agreement, secured upon real estate. The petition does not seek to enforce the claim against the land. The cases cited (31 Mo. 98 and 67 Mo. 654) have no relevancy whatever. Other objections against the petition are so manifestly untenable that we can not bestow further time upon them.

A stipulation is on file wherein counsel on both sides ask our inspection of a copy of a deed of trust which was filed with the petition, as an exhibit, in the court below, and they further ask us to construe and finally determine the effect of the covenants, as expressed in said deed, to the end that further litigation may be avoided. This, in effect, requests that we assume a jurisdiction which is expressly forbidden to us by statute. "No exception shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court." Rev. Stats., sect. 3774. The circuit court decided no question of construction on the face of the deed itself. To do so would be to pass upon the admissibility or sufficiency of the deed, as evidence to sustain the allega-

Digitized by Google

tion in the petition. This the court could not lawfully do, on a demurrer to the petition. Counsel say, in argument that the learned judge of the circuit court did in fact examine the deed and construe its contents, whereby his judgment was influenced, on the demurrer. The record shows nothing of the sort. But if it showed that he did so, it would only show that he decided a matter not before him, and therefore not before us in this appeal. We think that the petition states facts sufficient to constitute a cause of action, and therefore that the demurrer was erroneously sustained. All the judges concurring, the judgment is reversed and the cause remanded.

FULTON IRON WORKS, Respondent, v. B. L. RIGGIN, Appellant.

November 20, 1883.

RES ADJUDICATA — STATUTE OF LIMITATIONS — FOREIGN JUDGMENTS. — A judgment against the plaintiff in one state on a demurrer to a plea of the statute of limitations, is a bar to a suit on the same cause of action in another state.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and judgment.*

HUDGENS & DAVIS for the appellant: Foreign judgments are entitled to full faith and credit. — Bigelow Estop., 195, 202, 204; *Sweet* v. *Brackley*, 53 Mo. 346; *Christmas* v. *Russell*, 5 Wall. 290, 304. This court can only inquire if that court had jurisdiction, and no further. — *Flanagan* v. *Hutchison*, 47 Mo. 237; *Barney* v. *White*, 46 Mo. 137.

PATTISON & CRANE for the respondent: To constitute a bar, the former judgment must have been upon the merits. — *Packet Co.* v. *Sickles*, 5 Wall. 592. This court has

Digitized by Google

held that "to give a judgment the required force as a bar, it must appear, either upon the face of the record or by extrinsic evidence, that the precise issue was raised and determined in the former suit." — *Tutt* v. *Price*, 7 Mo. App. 196, following the supreme court in *Offutt* v. *John*, 8 Mo. 120; *Spradling* v. *Conway*, 51 Mo. 51.

BAKEWELL, J., delivered the opinion of the court.

This was an action against appellant on a promissory note, dated St. Louis, January 3, 1876, executed by Riggin & Chapman, a firm, of which defendant was a member. The defence set up was, that the matter is *res judicata*. There is no dispute about the facts. It appears from the pleadings and evidence, that plaintiff began an action on this note against this defendant, in the district court for the county of Chaffee, Colorado. Defendant was duly served, appeared to that action, and demurred to the petition on the sole ground that the action was barred by the laws of Colorado. In that state, any action is barred within six years unless the action accrued without that state, in which case, it is barred in two years. Both parties appeared by counsel, and, on hearing, this demurrer was sustained, and judgment was entered for defendant on January 8, 1880. Plaintiff had declined to plead over. After judgment he obtained time to file a bill of exceptions. Plaintiff took no further steps towards perfecting an appeal, and on January 8, 1882, the district court aforesaid entered final judgment for defendant, *nunc pro tunc*, as of January 8, 1880.

In the suit at bar, there was judgment for plaintiff, on this state of facts, for $2,726.25

It is not disputed, of course, that full faith and credit must be given in each state of the Union to the judicial proceedings of every other state, and that, if a judgment is conclusive in the state in which it is pronounced, it is equally conclusive everywhere in the United States. To

give a judgment the effect of a bar, however, it must appear that the issue in controversy in the second suit was determined in the former one. If, upon the face of the record, anything is left to conjecture as to what was necessarily decided, so far, the former judgment is no estoppel, for want of requisite certainty.

It is contended by respondent, as we understand him, that the Colorado judgment is no bar to a second action between the same parties on the same note, on the ground that that action determines only that there could be no recovery in Colorado, under the circumstances, because of the bar of the statute in that state, and that it does not determine that the plaintiff may not recover upon the same cause of action against the same defendant in another state where the statute prescribes a longer period.

The second suit, however, is for the same cause of action. The maxim is, *nemo debet bis vexari, si constat curiæ quod sit pro unâ et eâdem causâ.* And the reason why courts of justice will not disturb matters once tried between the same parties is, that it is for the interest of the commonwealth that there should be an end of litigation. *Bell* v. *Hoagland*, 15 Mo. 364. Plaintiff selected his forum. There was a final judgment against him. He might, after the demurrer, have dismissed his action; but he elected, with his eyes open, to allow judgment to go against him on the merits, that is, on the question whether or not he had a subsisting cause of action against defendant on this note. An adjudication made in one state is equally conclusive as an estoppel in every other state, and, "if a person having a demand against another, go into a state and sue upon it, and the plea of the statute of limitations of that state be interposed and sustained, he can not return with his demand to the state whence he took it, and maintain an action on it there." This is the language of Mr. Freeman in his treatise on Judgments (3d. ed., sect. 575), and he is supported by the authority of *Sweet* v. *Brackley* (53 Me. 346), which is directly in point.

Digitized by Google

Both on reason and authority, we think that the Colorado judgment was a bar to the second action. The judgment will, therefore, be reversed. There seems to be no reason for remanding the cause, and judgment will be entered here for defendant. Judge LEWIS concurs. Judge THOMPSON dissents.

JOHN FRANCIS, Appellant, *v.* J. B. GROTE ET AL., Respondents.

November 20, 1883.

1. LIMITATIONS — TAXES — EJECTMENT. — Under the limitations imposed by the revenue law of 1872, a recorded tax deed is, after the lapse of three years, a bar to an entry in an action of ejectment against the purchaser at tax sale, unless such sale is absolutely void.
2. TAXES — EJECTMENT. — It is immaterial, in an action of ejectment begun by the original owner against the purchaser at tax sale, more than three years after the tax deed has been recorded, that the tax deed recites facts which render it voidable.
3. CONSTITUTIONAL LAW — TAXES. — A revenue law which provides for a judgment for taxes without personal service upon the owner of the land and for summary proceedings to collect the same, is not necessarily unconstitutional.

APPEAL from the St. Louis Circuit Court, ADAMS, J. *Affirmed.*

FINKELNBURG & RASSIEUR, for the appellant: A tax sale of several lots in one proceeding is void. — *Keene* v. *Barnes*, 29 Mo. 377; *State* v. *Richardson*, 21 Mo. 420; *Yankee* v. *Thompson*, 51 Mo. 234. If it appears that the law has not been strictly followed the tax deed conveys no title. — *Donohoe* v. *Heidel*, 33 Mo. 335; *Dunlap* v. *Henry*, 76 Mo. 106; *Ewart* v. *Davis*, 76 Mo. 129. If the deed on its face shows that the sale was void, the record can not give it a vitality which it did not in itself possess, and hence the

Digitized by Google

special limitation provided for in sections 221 and 222 never went into operation. The record of such a deed is a nullity.—*Stevens* v. *Hampton*, 46 Mo. 404; *Bishop* v. *Schnieder*, 46 Mo. 472; *Musick* v. *Barney*, 49 Mo. 458; *Moore* v. *Brown*, 11 How. 414.

M. W. HUFF, for the respondents: If one holds under a tax deed for three years after the same is recorded, and no suit is brought to set the same aside, his title is perfect, and can no longer be affected by the claim of former owners.—*Knox* v. *Cleveland*, 13 Wis. 245; *Draw* v. *Early*, 15 Wis. 100; 17 Wis. 174; 29 Wis. 152; *Bowman* v. *Cockrill*, 6 Kan. 311 at 322; *Maxon* v. *Houston*, 22 Kan. 643; 27 Kan. 190; 28 Kan. 828; *Thomas* v. *Seckles*, 32 Iowa, 71; 34 *Id.* 262; 41 Iowa, 435; *Bullis* v. *Marsh*, 56 *Id.* 747.

BAKEWELL, J., delivered the opinion of the court.

This was ejectment for a lot in the city of St. Louis. The answer was a general denial; defendant further set up in his answer that he was rightfully in possession under a tax deed executed and delivered to him under the revenue law of 1872.

On the trial it was admitted that both parties claimed under the city of St. Louis. Plaintiff offered in evidence a deed from the city to him. Defendant offered the tax deed to him, dated July 29, 1875, recorded August 5, 1875. This was admitted against plaintiff's objection. Defendant offered evidence tending to show that he had been in possession under his deed since 1877. The trial was without a jury, and the finding and judgment were for defendant. The deed by the collector to Allen is in the form prescribed by the then existing law (Acts 1872, Adj. Sess., p. 128, sect. 218), for deeds by the collector, of lands sold for taxes. The deed described, as the property sold, lots 13 and 14, of block 2, city commons, block 1470, assessed for the year 1871 to Koenig and Morehead, and for 1870 to Koenig,

Digitized by Google

also, lot 16, block 42, of city commons, block 1554, assessed for the years 1870 and 1871 to John Francis, this last lot being the property in controversy. The deed recites that judgment was obtained against these tracts in the county court of St. Louis County, at the August term, 1872, for $45.55, being the amount of taxes, penalty, and costs assessed on these tracts for the years 1870 and 1871, recites the special execution and the sale thereunder by the collector on October 24, 1872, and the purchase of the lots by defendant at that sale at the price of $45.55 for the entire tract described, which was the least quantity bid for, and proceeds according to the prescribed form.

The law of 1872 prescribes that the judgment of the county court upon the delinquent tax list shall be entered against the several tracts or lots in the list, and that the decree shall be, that "the several tracts and lots, or so much thereof as shall be sufficient of each of them to satisfy the amount of taxes, interest, and costs annexed to them severally, be condemned and sold to satisfy the same, as the law directs." Sect. 193. The act requires that each lot shall be chargeable with its own taxes, no matter who is the owner (sect. 204); and provides for separate proceedings and separate sales as to each lot. Sects. 135, 196, 199, 200. The law provides for notice by publication of the delinquent list (sect. 184), which is to be notice of application to the county court for judgment, and of the sale by order of court, and that the assessment and advertisement are to be taken to impart notice to the owner. Sect. 204. The judgment of the county court and order of sale, are to have the same effect as a judgment of the circuit court (sect. 194); and the act provides for appeal to the circuit court by any person aggrieved (sect. 195); and the sales are to be as valid and effective as sales under execution by the sheriff on judgments of the circuit court. Sect. 196. The deed is to be *prima facie* evidence that the provisions of the law have been complied with. The

Digitized by Google

act further provides (sects. 222, 223), that any suit against the tax purchaser for the recovery of the lands sold for taxes, or to defeat such a sale, except where the taxes have been paid, or the land was not taxable, or has been redeemed, shall be commenced within three years from the time of recording the deed, saving their rights to infants and lunatics; and that (sect. 223) any person recording a tax deed in the proper county shall be deemed to have set up such a title to the land described in it, as shall enable the person claiming to own the land, to maintain an action for recovery of the land against the grantee or those claiming under him.

1. The special statute of limitations embodied in the revenue law of 1872, and set out above, would be no protection to a purchaser at a tax sale, if it were to be held not to operate in case of a voidable sale for taxes. If the sale and deed by which the defendant purchased were absolutely void, then he was not a purchaser at a tax sale, and the limitation does not apply to his case; but if the sale was irregular to such a degree that it might have been avoided by timely proceedings, then the case is precisely that provided for by the two hundred and twenty-second section.

If the sale had been made by a constable, or before the date prescribed in the revenue law, the sale would have been absolutely void, and in no proper sense a tax sale. But here the recitals in the deed show jurisdiction, the judgment required by law, execution on the judgment, and a sale by the proper officer at the time prescribed by law, and after the notice prescribed by law, and in the place prescribed by law. The sale of three lots assessed to two persons in a lump was illegal, and, as the supreme court held of a similar tax sale (*Keene* v. *Barnes*, 29 Mo. 384), could not be sustained. But we do not regard it as absolutely void. The collector's deed gave a colorable title. It is impossible, without construing away the law, to hold

Digitized by Google

that the legislature intended that a collector's deed for taxes should be held to be absolutely void upon its face when offered by the defendant in ejectment, merely because it appears from its recitals that the sale had been made contrary to law in some important particular. The deed might have been bad upon its face, if offered within three years, and yet good enough after the time of limitation. The question is not as to its validity as an element of good title *per se;* but whether in connection with three years' possession by the defendant who claims under it, it shows color of title for a sufficient length of time to bar entry by the plaintiff. In the case of *Pillow* v. *Roberts* (54 U. S. 472), which arose upon a similar statutory provision in Arkansas, but which is not precisely on all fours with the case at bar, because it does not appear that the deed offered was so gravely defective as the one under consideration, Judge Grier says: "But assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence in connection with proof of possession in order to establish the defence under the statute of limitations. * * * The thirty-fifth section of the statute of Arkansas provides that all actions against the purchaser for the recovery of lands sold by any collector of revenue for the non-payment of taxes, shall be brought within five years after the date of such sales, and not after. Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. * * * Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and

Digitized by Google

of course adversely to all the world. * * * In order to entitle the defendant to set up the bar of the statute after five years' adverse possession, he had only to show that he, and those under whom he claimed, held under a deed from a collector of the revenue, of lands sold for the non-payment of taxes. He was not bound to show that all the requirements of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he would be entitled to it. Such a construction would annul the act."

In Iowa it has been held that when no sale has been had, that fact might be shown to avoid the tax deed, though the bar of the statute had apparently attached. There, of course, there was no "purchaser at a tax sale." But in that state, and in other states having statutory provisions similar to those of the revenue law of 1872 under consideration, the case just cited from the supreme court of the United States has been followed. In Kansas it has been held that, where the proceedings were fatally defective for misdescription of the land on the assessment roll and sale certificate, this could not be shown after the bar of the statute had attached, to impeach the deed. *Maxon* v. *Huston*, 22 Kan. 643. The language of the Kansas statute (2 Kan. Stats., sect. 5495), is identical with that of the Missouri section 222, except that "five" is changed to "three." In *Bowman* v. *Cockrill* (5 Kan. at p. 330), it is said that irregularities that would render a tax deed void before the statute of limitations has run in its favor, can not be invoked against the deed after the bar has attached. In Iowa, where the statute is as with us, it has constantly been held that it operates as a bar in all actions based upon irregularities in the sale or defects in the tax deed. *Thomas* v. *Seckles* (32 Iowa, 71), and *Douglass* v. *Tullocks*

Digitized by Google

(34 Iowa, 262), are cases in which the deed showed on its face that several tracts were illegally sold for a gross sum, as in the case at bar. In Arkansas an invalid tax deed, with proof of actual possession during the period of limitation, is held sufficient to bar entry by the plaintiff. Cases in other states on like statutes are cited in respondent's brief to the same effect.

2. It is objected that the provision is unconstitutional as applied to sales under the law of 1872, as there is no notice, and the tax debtor has not his day in court. But there is nothing in the objection. It has never been held that any revenue law was unconstitutional on the ground that it made no provision for personal service on the owner of the land sold for taxes.

In Tennessee, Ohio, Indiana, and Illinois, statutes have been in force authorizing the collector to apply for judgment against the lands of delinquent tax payers on notice in a newspaper of his intention to do so, and the court was authorized on this notice to render judgment for taxes, and order a sale of the land, as under our law of 1872. And these summary tax laws are held to be constitutional. They must be held so, from the exigencies of the case. If the government were required to give personal notice and proceed according to the usual forms of the common law to collect its taxes, it might have great difficulty, and in many cases find it impossible to do so. *McCarroll* v. *Weeks*, 2 Over. 215; *Murray* v. *Hoboken Land Co.*, 59 U. S. 272. "It is conceded," says Judge McGirk, in *Morton* v. *Reeds* (6 Mo. at p. 74), "that the collection of taxes can not in general be made by ordinary suits. Of necessity the proceeding must be summary and *ex parte*." The departure, from the ordinary processes of the common law, provided by its beneficent care that no man's property should be taken from him without giving him a fair hearing, does not seem to be wide or grievous where the tax payer has notice by publication with a description of

Digitized by Google

his land, where the payment of taxes is an annual duty recurring at a fixed period, the neglect of which alone can imperil his property, where there is a right of appeal, a right to redeem during a long period, and a right to set aside the sale for irregularities which can not be barred by limitation, except where the property owner has been utterly careless during a period years, of asserting his rights.

We think that the judgment of the circuit court was correct, and with the concurrence of all the judges, it is affirmed.

AUGUSTUS KNIGHT v. D. M. FROST, Respondent, AND JESSE HOLLIDAY, Appellant.

November 20, 1883.

1. CORPORATIONS — STOCKHOLDERS — PROCEEDINGS BY MOTION — EXECUTIONS. — In a proceeding by motion against a stockholder it is sufficient if it be shown that execution issued against the corporation and that there was no property whereon to levy it, though the return of *nulla bona* on the execution be made before the return day.
2. —— NOTICE OF MOTION — PRACTICE. — A plaintiff having given notice of his motion against a stockholder, on a *nulla bona* return of the execution, that he causes a second execution to issue and gives a second notice is not necessarily fatal to his recovery on the first motion, he having dismissed his second motion.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Reversed and remanded.

G. A. CASTLEMAN, for the appellant: All that is required of the creditor is to issue execution and to show that the corporation had no property. — *Turner* v. *Adams*, 46 Mo. 95; *Kent* v. *Curtis*, 4 Mo. App. 121, 128, 130; Thompson on Liab. Stock., sect. 320; *Marks* v. *Hardy*, 12 Mo. App. 595.

JOHN M. DICKSON and H. I. D'ARCY for the respondent: The decree is correct, as the statute obviously requires not

Digitized by Google

only an execution, but the sheriff's action thereunder, without which action it would be "the shadow of a shade." — *Nixon* v. *Green*, 11 Exch. 549; *Skrainka* v. *Allen*, 76 Mo. 384; *Shermerhorn* v. *Conner*, 41 Mich. 374; *Jessups* v. *Carnegie*, 80 N. Y. 643–653. The second motion of defendant Holliday, and his action thereon, estopped him to retreat to the first motion, it having been solemnly abandoned. — *Ramage* v. *Clements*, 4 Bush (Ky.), 161; *Turner* v. *Davis*, 48 Conn. 397.

BAKEWELL, J., delivered the opinion of the court.

The statute provides (Rev. Stats., sect. 736) that: "If execution shall have been issued against any corporation, and there can not be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders, to the extent of the amount of the unpaid balance of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder, except upon an order of the court in which the action shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged."

Defendants Frost and Holliday are judgment creditors of the Butchers and Drovers' Bank; they both moved for execution against Knight, a stockholder of that bank. Knight paid into court the amount unpaid on his shares, and, on his petition, the court required the two judgment creditors to interplead for this sum. On hearing, there was a decree in favor of Frost.

The facts are admitted, and, so far as material, they are as follows: —

The interpleader, Holliday, caused execution to be issued on March 8, 1881, returnable to the April term, and the execution was returned on the next day *nulla bona*, by order of plaintiff's attorney. Holliday gave notice to the stockholder on March 16th. Frost caused his execution to be issued on

Digitized by Google

May 16, 1881, returnable to the June term. This execution was regularly returned *nulla bona*, on the first day of the June term; and Frost gave notice to the stockholder on June 6th, immediately after the return of his execution.

On the hearing, Holliday introduced in evidence a series of executions against the bank, to the April, June, October, and December terms, 1881, of the circuit court, all returned *nulla bona*. The trial judge found as a fact that the bank was shown to have no property subject to execution, at the time Holliday's execution was returned.

The statute does not, in terms, require a return of *nulla bona* upon the execution. Undoubtedly, the return of the sheriff will usually be the best evidence that the corporation has no goods. But it is not the only evidence. We held in *Marks* v. *Hardy* (12 Mo. App. 595), that, where execution had issued against the stockholder, though there was no positive return of *nulla bona* upon the execution, if the fact appears that there were no goods, there is sufficient basis for the motion.

We see no reason to depart from what was said in that case, that, "if the plaintiff, by any competent evidence satisfy the court of this condition, the law will be fulfilled." Execution must undoubtedly issue, because the statute expressly prescribes this; but the law does not say, "if the execution be returned *nulla bona*," but, "if there can not be found any property whereon to levy." Appellant brought himself clearly within the letter of the law; and, as we think, also, within its spirit. If, before the return day, the sheriff becomes satisfied, after due search and inquiry, that he can discover no property, and returns his writ at once, and before the regular day, it is held in many States, that such a return will support supplemental proceedings, under statutes requiring a return. Freem. Ex., sect. 399. A fraudulent and collusive return, made at the instigation of plaintiff, would, of course, be set aside on proper application. But, when the return is shown to be

Digitized by Google

in strict accordance with the fact, no reason appears why it should not be equally good, whether made by the sheriff *proprio motu* or at the direction of plaintiff. In *Skrainka* v. *Allen* (76 Mo. 389), the supreme court adopts the language of Baron Alderson as to this statute (which we adopted from England), that the fact that there are no goods "is ascertained the moment the sheriff has returned *nulla bona*." But, neither the English nor the American court says, that the fact can only be ascertained by the return of the sheriff made of his own motion. There is no question, as is suggested by counsel for respondent, of any equitable dispensation from any positive requirement of the law. Equity is not in any way called upon to aid the execution of a statutory power; because, though the statute does say that the execution must issue, and that there must be no property of the corporation out of which it may be satisfied, it does not say that the fact that there are *nulla bona* of the corporation can be legally ascertained for the purpose of authorizing a recourse upon the stockholder, only by a return to that effect of the sheriff, made of his own motion, in the regular course of his duty.

The case, though not the same, derives illustration from those cases which are decided under statutes giving to a judgment creditor the right to proceed by *scire facias* against the sureties of the debtor, or to apply for equitable relief against the debtor. A debtor ought not to be harrassed by a suit in chancery where he has property that may be reached at law during the life of the execution; and when the plaintiff comes into chancery for relief, he must first have exhausted his legal remedy. Statutes giving this equitable relief, usually provide for a return of *nulla bona* upon the execution before the equitable relief can be had. But, even under these statutes, it is not uniformly held that the return must be made upon the return day of the execution. Nor is it held that a return before the day is an absolute nullity.

Digitized by Google

In New York, under the statutory provision that whenever an execution, issued upon a judgment at law, shall have been returned unsatisfied, in whole or in part, the plaintiff may file a bill of discovery, it was formerly held that the remedy could not be held exhausted so as to allow of the filing of a creditor's bill before the expiration of sixty days when the statute provided that the *fieri facias* was "returnable sixty days from the receipt thereof by the sheriff," although the execution had been actually returned before the return day; and this was followed, as the undoubtedly true rule, in Michigan, Maine, and Massachusetts. *Cassiday* v. *Meachum*, 3 Paige Ch. 311; *Steward* v. *Stevens*, 1 Harr. Ch. 169; *Adams* v. *Commiskey*, 4 Cush. 420; *Roberts* v. *Knight*, 48 Me. 171. But, afterwards, when, by the New York code, the execution was made returnable "within sixty days after its receipt by the officer," it was held that the sheriff may return the execution at any time within sixty days, and that when actually returned by him, it is a consummated official act, and any other proceedings may be based thereon. — *Forbes* v. *Walker*, 25 N. Y. 430; *Tyler* v. *Willis*, 33 N. Y. 327. This interpretation of the language of the New York statute is contrary to that given to the same language in Massachusetts, where it is held (*Adams* v. *Commiskey*, *supra*), that the words, "within sixty days," as a direction to return an execution, mean, "at the end of sixty days." The supreme court of New York says, in *Tyler* v. *Willis* (*supra*): "Where there is no collusion or fraud shown, and no intent proved, on the part of plaintiff or his attorney, to prevent a levy on the property of the debtor, there is no law that requires the sheriff to keep an execution sixty days. He may do so; and if he can find property, he ought to make the amount out of the property, even if he requires sixty days for that purpose; but, where the sheriff knows the debtor to have nothing, where he has, on previous executions, exhausted all the property of the debtor, and where he has returned such

Digitized by Google

executions unsatisfied, it would be idle to require him to retain such process in his hands for two months, for no other purpose than to prevent the plaintiff from resorting to other means of collecting this claim." In *Forbes* v. *Walker* (*supra*), the court of appeals says: "The request of plaintiff's attorney to the sheriff to return the execution sooner than sixty days, does not affect the question. It is his duty to enforce and collect the execution, to levy on the property of the judgment debtor, if he has any within his bailiwick. If he notoriously has no property liable to levy and sale on execution, the sheriff, as we have seen, may properly, at his risk, return the execution immediately upon its receipt. The request of the plaintiff or his attorney, can not affect or alter his duty, or change the force or validity of his official return. This is made upon his official responsibility, and must be so made, in all cases."

The learned author of a well known treatise on Executions (Freem. Ex., sect. 353) uses this language: "In New York, the rule has been established by frequent adjudications, that the officer need not keep his writ until the return day. "If he feels confident that the defendant has no property subject to execution, and is willing to assume the *onus* of establishing this fact, he may, before the return day, return the writ unsatisfied. Such a return, when made in good faith, is valid, and will support subsequent writs and proceedings, to the same extent as if it were made on the return day. The rule thus established in New York is in opposition to the majority of the authorities elsewhere." (At section 399, it is said, in the same treatise, that the weight of authority is with the New York case.) "The fact that the defendant has no property subject to the writ when it comes to the officer's hands is, it is claimed, no assurance that he will continue to have none until the return day. It is also insisted that the time given to return a writ is designed partly for the benefit of the defendant, in order that the officer may not be forced

Digitized by Google

to proceed with needless vigor. Hence, the courts of Michigan, Massachusetts, and Missouri have very decidedly pronounced against returns made before the return day, treating them, not only as premature, but as insufficient to support further proceedings resting upon them. * * * We can not avoid a conviction that the doctrine of the New York cases is agreeable with reason, and conducive to justice. When it can be clearly shown, that the defendant has no assets subject to the writ, there is no reason why the plaintiff's other remedies should continue in abeyance until the return day. The plaintiff may wish to prosecute proceedings at law supplemental to execution, or he may desire to file a creditor's bill in equity. In either case, his success usually depends upon the promptness with which he can act. It is cruel to compel him to remain idle, waiting for the return day, and affording the defendant ample opportunities to perfect such measures as may best enable him to elude all subsequent proceedings."

In support of what is said as to the rulings in Missouri, Mr. Freeman cites only *Dillon* v. *Rash* (27 Mo. 243). That case is also cited by counsel for respondent, and urged upon our attention as conclusive in his favor. But we do not think it can be considered so. The case was this: Execution was issued on the judgment of a justice of the peace, and returned *nulla bona* before the return day; and, on the day on which it was returned, execution was issued on a transcript of the same judgment, filed in the circuit court clerk's office. The supreme court held that the latter execution should be quashed on motion. Judge Scott, in delivering the opinion of the court, says, that the proceeding has the appearance of a design to deprive defendant of an advantage secured to him by law, which is intended to show indulgence to the debtor. Regularly, an execution can not be returned before the return day. Defendant may have property before that time. The court holds, that a construction of the statute by which judgment may be had,

Digitized by Google

transcript filed, execution issued and returned, and execution awarded from the clerk's office and levied, all in one day, with a view to reach defendant's real estate, can not be in accordance with the mind of the legislature, and we think this is obvious; but it by no means follows that the legislature intended by the statute under construction, that the judgment creditor of an insolvent corporation should wait until the return term of the execution before proceeding against the stockholder. This might involve a delay of six months. It may be for this reason, that the legislature abstains from mentioning the return of the execution. And so, in Maine, notwithstanding it is there held, as we have seen, that, to authorize *scire facias* against sureties, or proceedings by créditor's bill, the execution must first be returned unsatisfied and that this can be done only at the return term, yet, under a statute of that state, which provides that, six months after return of an execution unsatisfied against a corporation, the plaintiff may require any stockholder to disclose attachable property of the corporation, it is held, that the return may be made before the return day, and whenever, within the life of the execution, the facts will warrant it. *Lovegrove* v. *Brown*, 60 Me. 592.

In Kentucky, under a statute providing for a remedy by creditor's bill whenever the *fieri facias* "shall issue to the proper officer, and be returned, as to whole or any part thereof, in substance, that the defendant hath no effects in his bailiwick to satisfy the same," though the statute of executions provided that there should be not less than thirty, nor more than ninety days between the *teste* and return day of the execution, and the execution was returned *nulla bona* in two days, it was held that this return, though irregular, was not null and was sufficient to authorize the filing of a bill to reach the debtor's choses in action. *Dana* v. *Banks*, 6 J. J. Marsh. 219.

But, whatever view may be adopted as to the question whether or no a return of *nulla bona* made before the return day ought, in an ordinary case, to support ulterior proceed-

Digitized by Google

ings, and however such a return may be treated as premature, we do not think that such a return can be treated as an absolute nullity. It is held, in a case in Maryland (*Turner* v. *Walker*, 3 G. & J. 385), that a return not made in term is void. But that was where the return of the *fieri facias* was made the basis of a *capias*. Where the return to the execution is to be followed by an order to take the body of the defendant it would be hard, indeed, not to hold it void, if so returned as to give the defendant no day in court to protect his rights. But, where the return is to be made the basis of ulterior proceedings against property only, and is made in good faith, and is in accordance with the fact as shown by other returns to other writs, no sufficient reason appears for holding it, under all circumstances and for all purposes, absolutely void. The statute we are considering requires that execution should be issued, and of course the execution should also be returned. The return of *nulla bona* would not be conclusive whether regularly made or not. *Marks* v. *Hardy* (12 Mo. App. 595), is no authority for the proposition that the remedy against the stockholder could be had before a return, or after a return, made before the return day of the execution, because, in that case, a return had actually been made which was quite regular; but the reasoning of that case, and what is said in it as quoted above, leaves the respondent here no standing-room.

Skrainka v. *Allen* (76 Mo. 384), decides that the stockholder is to be charged on the stock held by him at the date of the return of *nulla bona*, and not only on that held by him at the time the motion was filed. This supposes a return. But it does not necessarily suppose a return at the regular return day of the execution. That case is based, so far as this point is concerned, upon the English case of *Nixon* v. *Brownlow*. The English statute is the one under consideration in *Skrainka* v. *Allen*, and here, for we have adopted the statute from England word for word. In *Ilfracombe Railway Co.*

Digitized by Google

v. *Devon Railway Co.* (2 C. P. 15), Willes, J., says: "I do not consider that Baron Alderson meant to say that it is necessary that the return should have been filed." This is a reference to the language of Alderson, B., cited by our supreme court in *Skrainka* v. *Allen*, that the fact of no effects "is ascertained the moment the sheriff has returned *nulla bona*." Willes, J., further says in the Ilfracombe Railway case just cited, that, even the return of *nulla bona* is only *prima facie* evidence of no goods, and that it must appear that reasonable efforts have been made to discover property of the corporation.

The English case just referred to seems to be directly in point. It decides that to entitle the judgment creditor to a *scire facias* against a shareholder under the act, it is not necessary that the sheriff's return to abortive writs should have been actually filed. The writs had been returned, according to the English practice, to the attorneys who issued them. It is evident that there was no regular return until the writs had been filed. Counsel who showed cause against the application for a *scire facias* stated in court, and filed affidavits to the effect, that search had been made, and no record had been made of the execution against the corporation. It was argued that the return operates nothing until filed, and that until filed, there could be no action for false return against the sheriff. It is evident from the whole proceeding, as reported, that the sheriff had indorsed his return upon the writs which were in court, but that the writs had not been returned. The irregularity in that case seems to be as great as that in the case at bar. Here, as in that case, the return was made, in the sense that the sheriff had indorsed it upon the writ; but the writ had not been regularly returned in the English case, any more than in the one before us.

2. In the view that we take of the law, it now becomes necessary to consider the effect of another and further state

Digitized by Google

of facts admitted upon the record. On May 18, 1881, Holliday caused to be issued a second execution against the bank upon his judgment. This execution was, in due course, returned *nulla bona* to the June term. On September 12, 1881, Holliday again gave notice to the stockholder, Knight, and filed a second motion based on this execution. It was in the interval between these two notices that Frost served upon Knight, and filed, his motion.

Does this filing of a second motion by Holliday work an abandonment of his first motion, and thus give precedence to Frost?

This second motion has been dismissed. The institution of the first proceeding furnished an excellent and sufficient ground that the second should abate. But we can see no reason why the filing of the second motion should work any prejudice to any precedence gained under the first, which appellant did not abandon, but prosecuted it.

We are cited by respondent to two cases. But we think that neither of them sustain his position. It is held in *Ramage* v. *Clements* (4 Bush (Ky.), 161), that one who obtained a voidable judgment against a minor by whom no defence was made, and who caused the action to be again placed on the docket, and another summons issued, could not, after the defendant had appeared to the second action and defeated plaintiff in a trial, retreat from that defeat, disregard the last judgment, and enforce the previous one, which was voidable in its inception, and to which the second trial showed that plaintiff was not entitled.

The Connecticut case (*Turner* v. *Davis*, 48 Conn. 397) goes to this, that a plaintiff can not at the same time pursue two remedies inconsistent with each other, and that, having elected to treat B. as in possession of the premises in controversy, he can not, at the same time, proceed upon the inconsistent and contradictory theory that A., and not B., is in possession. When the essential facts on which

Digitized by Google

two different remedies proceed are repugnant, the common sense of the matter obviously is that they can not both be pursued at once. But this, we believe, has never been seriously disputed.

We are of opinion that, upon the admitted facts of the case before us, the decree should have been for appellant, and the judgment will be accordingly reversed, and the cause remanded to the circuit court with directions to enter a decree that the interpleader Holliday is entitled to the fund paid into court after deducting therefrom the costs of the proceeding up to the date of the appeal.

Judge LEWIS is absent. Judge THOMPSON concurs.

HENRY KORTJOHN, Appellant, *v.* CHRIST ALTENBERND, Respondent.

November 20, 1883.

PRACTICE — NEW TRIAL. — It is error for the trial court to order that, unless the defendant, in whose favor a verdict is rendered on account, will consent to a judgment against him for a specified sum, a new trial will be granted; but, if the defendant consents, the error is not ground for a reversal on the plaintiff's appeal, where the original verdict is warranted by the evidence.

APPEAL from the St. Louis Circuit Court, BARCLAY, J.

Affirmed.

KLEIN & FISSE, for the appellant, cited *Jones* v. *Water Co.*, 18 Ga. 539; *Anderson* v. *Railroad Co.*, 54 N. Y. 334.

B. SCHNURMACHER, for the respondent: Where the judgment is evidently for the right party, and the appellant could but be a loser if he should be granted a new trial, the appellate court will not reverse the judgment. — *Hedecker* v. *Ganzhorn*, 50 Mo. 154. Even though errors were committed by the court below. — *Jackson* v. *Magrudder*, 51 Mo. 55.

Digitized by Google

BAKEWELL, J., delivered the opinion of the court.

This was an action begun before a justice of the peace to recover $60 for commissions on a sale of real estate, and also $5 for drawing the deed, and $1 paid to the notary for the acknowledgment.

There was a verdict and judgment for defendant. Plaintiff moved for a new trial. The court thereupon made an order that, unless defendant would file a stipulation consenting to a judgment against him for $6, the motion would be sustained. The defendant filed a stipulation accordingly. Thereupon judgment was entered for plaintiff for $6. The costs of the circuit court to date of the judgment were adjudged against plaintiff, for the reason that the amount recovered in the circuit court did not exceed the recovery before the justice.

Plaintiff testified that he was a real estate dealer; that one Vortreide came to his office inquiring about some real estate owned by defendant, for which he offered $40 a foot. Plaintiff reported this offer to defendant, telling defendant that his commission would be two and a half per cent. Defendant said that he must have $40 a foot, Plaintiff then saw Vortreide, got from him $50, paid it to defendant, as earnest money, got his deed and abstract of title; drew the deed and sent the notary to defendant's house and paid him $1 for taking the acknowledgment. Plaintiff requested the purchaser to give him $60 in cash and the balance of the purchase-money in a check. He intended to hand to defendant only the check; but changed his mind and gave him both check and money. Defendant then signed the deed, and, after it was delivered, plaintiff demanded his commissions, which were refused.

Defendant swears that he told plaintiff from the first that he must have the $40 a foot for himself; that plaintiff said nothing about commissions until the matter was closed. That plaintiff first handed him the check, whereupon

Digitized by Google

defendant said the sum was too small by $60, and refused to sign the deed. The plaintiff then went to his safe and got the balance in money and paid it to defendant. Defendant then signed and delivered the deed, and plaintiff then demanded $66. Defendant said that he owed nothing; that plaintiff had said nothing about commissions. Defendant did not request plaintiff to draw the deed; but did ask him to have a notary call on his wife.

There was no other witness examined except Vortreide, who says that he was sitting in the front part of the office talking to another man; that the trouble between plaintiff and defendant began after the deed was signed; that plaintiff did not go to his safe for money; but that he (the witness) paid no attention to what passed.

The instructions given were of such a character, that the jury, to find for defendant, must have found that there was no sufficient evidence of any agreement, express or implied, that defendant should pay plaintiff any commision whatever for the sale, or anything for drawing the deed or for expenses, or that defendant employed plaintiff to draw the deed. We see nothing in the instructions, or in any ruling of the court during the trial, which could prejudice the plaintiff. The trial seems to have been a perfectly fair one in all respects. The testimony was contradictory. The court, in effect, said to the jury: if you believe plaintiff you will find for him; if you believe defendant, you will find for him. The jury apparently did believe defendant, as it was their right to do.

But if the learned judge of the trial court saw grounds for granting a new trial which, upon a close scrutiny of this record, are not apparent to us, he had no right to impose the terms which he imposed upon defendant. Where a verdict for plaintiff is excessive, it is the practice to require plaintiff to remit the excess. But it is against all principle

Digitized by Google

of jury trials that, where a verdict has been rendered for defendant, the court shall set aside that verdict, and without the consent of both parties find for plaintiff, and determine the amount of his damage. The case of *Jones* v. *Water Lot Co.* (18 Ga. 539), cited by appellant, seems directly in point as to this, if any authority is desired upon so clear a matter.

Our object, however, must be, as Lord Mansfield says, "to attain real justice, and not to gratify litigious feeling upon every point of *summum jus.*" To warrant us in reversing the case, it must appear that the action complained of is to the prejudice of appellant. The judgment was for defendant, and rightly so, so far as appears from this record. The trial court set aside this judgment and entered a judgment for plaintiff. Of this, defendant does not complain, and it does not appear how the plaintiff can do so. His only real ground for complaint must be, that the trial court refused him a new trial. But, whilst we think that the trial court erred in setting aside the judgment, we see nothing in the record why plaintiff should have a new trial. It was error to set aside the verdict under the circumstances, except for the purpose of granting a new trial; but, in the event, this did no harm to appellant; and it can not be said to be error to have denied a new trial to plaintiff, when the issues joined between him and defendant have been fairly tried by a jury and found against him. To reverse the present judgment for the purpose of now granting a new trial, would be to deprive respondent of all benefit of his verdict, and do him a clear wrong. He ought not for anything that appears on this record, to be put to litigate this matter again.

The judgment is affirmed. All the judges concur.

Digitized by Google

PETER SIEMERS ET AL., Appellants, v. GUSTAV SCHRADER ET AL., Respondents.

14 346
115m 361

November 20, 1883.

1. NOTICE — COMPUTATION OF TIME. — An advertisement published for the first time on May 14th for a sale on June 2d. is not made in compliance with the terms of a deed which requires twenty days' notice to be given.

2. ESTOPPEL — EJECTMENT. — The rule that one who is in possession under the plaintiff can not dispute the plaintiff's title in an action for possession, is held not to apply to this case for want of evidence of the plaintiff's title or of the defendant's possession under him.

3. EJECTMENT. — A plaintiff in ejectment can not recover on the weakness of the defendant's title, but must rely on the strength of his own.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

THOS. A. RUSSELL, for the appellants.

PATTISON & CRANE, for the respondents.

BAKEWELL, J., delivered the opinion of the court.

This was ejectment against Schrader, who was tenant of Chambers. Chambers, of his own motion, was made co-defendant. He admitted possession; but denied all other allegations of the petition; and, as an affirmative defence, he set up purchase at a tax sale in October, 1872, and a tax deed to him in pursuance of the sale, filed for record on February 26, 1876; and pleaded the special three year limitation of the revenue law of 1872, in bar. He also pleaded adverse possession for ten years before this suit.

The cause was tried by the court, a jury being waived. The finding and judgment were for defendant.

The premises in question are lots 9 and 10 in block 2 of Blow and LeBeaume's addition, being block 743 of St. Louis.

It was stipulated that Virginia Brault was in possession, claiming to own the premises, on December 1, 1868, and

Digitized by Google

remained in possession till March 28, 1876, at which date said Brault, with Harrison K. Bunch and Nancy Bowner, executed and delivered to defendant Chambers a quit-claim deed for the premises, and gave him possession. This suit was begun on May 20, 1882.

Plaintiff offered in evidence a deed of trust executed by Virginia Brault and H. K. Bunch to Butler, as trustee of John Barr, dated December 15, 1868, to secure a note of Brault and Bunch of same date, at six months, to order of Barr, for $300. The deed purports to convey the lots in question and also a 9 98/100 acre lot, being lot 22 of Graham's subdivision of the Sulphur Spring tract in Central Township. The deed is in the usual form, and provides for sale on default, on twenty days' notice in a St. Louis newspaper. The note was also offered. Across the face of it was written or stamped, "Paid. John R. Sayers, Teller." Plaintiff also offered the trustee's deed, dated June 2, 1870, to plaintiff Siemers, which purports to convey to him all the property described in the deed of trust, for $1,355, bid by Siemers at a foreclosure sale on June 2, 1870. This deed recites, that the note remained due and unpaid at and after the time specified in said note and deed of trust for its payment. The affidavit of the printer attached, shows an advertisement in the *St. Louis Times* for seventeen times. The first publication was on May 14th, and the last on the 2d of June. There was no publication on the 16th of June, 23d, and 30th of June. Defendant objected to the deed of the trustee, on the ground that it showed insufficient notice. The deed was excluded.

Plaintiff then offered in evidence a writing without date, signed by plaintiff Siemers, witnessed by Aug. Gehner and H. K. Bunch; proved by the witness as executed in June, 1870, in default of acknowledgment, and recorded on March 18, 1871. This instrument sets out with a preamble, reciting that a note made by H. K. Bunch to order of Margaret Holmes, dated August 22, 1864, at two years, was

Digitized by Google

secured by deed of trust executed by said Bunch upon five acres of the lot 22 of the Sulphur Spring tract mentioned above; that this note was sold by Holmes to Siemers on April 15, 1870, for $400, who owns and holds the same, and the deed of trust securing it. That said Bunch, on June 29, 1864, executed a deed of trust upon one acre of the same lot in the Sulphur Spring tract, to secure his note of same date at twelve months for $407, to order of Leonora Sackett; that Virginia Brault and Bunch executed the note and deed of trust above described as having been offered in evidence in this case; that Siemers, on April 30, 1870, paid $55 for an examination of the title of this property, and at same date paid to one Allen, who claimed to hold and own it, the amount of said $300 note, and thereby became owner of that note and the deed of trust given to secure it; that Siemers, in January, 1870, at the request of Virginia Brault, paid $221 in satisfaction of a judgment against her, whereby Brault became indebted to Siemers in that amount; that Siemers, in May, 1870, paid $700, the back taxes assessed against "said property," whereby Brault became indebted to him in that sum. The instrument then proceeds: "Now, therefore, in order to secure the said Siemers for the whole amount of money due him by the said Brault and Bunch, he the said Siemers agrees to sell, without unnecessary delay, the property described under the deed of trust herein mentioned, and at the said trustee's sale, bid in all of said property, and have a deed of the same made to him; but he, the said Siemers, also agrees, on the payment to him by the said Brault, or any one in her behalf, of the various sums of money herein named as having been paid by him, said Siemers, for said Brault and Bunch for said notes, with ten per cent interest on the whole amount, the costs and expenses of said trustee's sale, convey by proper deed the whole of said property to said Virginia Brault or other person by her named; the intent and meaning of this agreement being, that if said Brault

Digitized by Google

shall pay to said Siemers the money to which he is lawfully entitled on account of the transactions herein named, he, the said Siemers, then shall convey said property to said Brault unincumbered by said Siemers, being further understood and agreed between the parties that the said Siemers will not convey or otherwise dispose of the property herein described for the period of two years from this date, and that he, said Siemers, at or any time within the period of two years, upon the payment of principal and interest due him, convey the within property to Virginia Brault or whomsoever she directs; and the said Virginia Brault shall be entitled to sell the above described property and also to receive the rents and profits arising from said property." The part in quotation marks is accurately transcribed. Some words necessary to the sense are omitted in the original. Over the words "above described," last written above, is written, "and during that time;" but there is no caret mark to show where these words are to be inserted. This instrument is signed by Siemers alone. It is not sealed. On the back of it is written an assignment, in consideration of $500, to Nancy Bowner, of all rights belonging to Virginia Brault by virtue of this "bond." This assignment is dated September 7, 1870, and is signed, sealed, and acknowledged by Virginia Brault.

There was next introduced a quit-claim deed from Siemers and wife to E. P. Johnson his co-plaintiff herein, dated April 27, 1882, in consideration of $5,000, for the same property described in the deed of trust offered in evidence (being the property in suit), and the 9 98/100 acre Sulphur Spring tract.

Plaintiff then testified as to the value of the property in question. He said that he paid the sums required in the contract as he had agreed. That no one had paid him back any of the money so paid by him for Brault. That he never received any money from defendant Chambers or from Nancy Bowner. The Barr note was assigned to witness at

Digitized by Google

the time of the agreement with Mrs. Brault. Witness paid $328.75 for it, and has held and owned it ever since. The lots were fenced at the date of the agreement. The lots had a fence in the spring of 1870. It remained five or six years; some parts are there yet. Another witness testified as to values, and the improvements on the ground.

This was all the testimony for the plaintiffs.

The defendant Chambers then introduced his tax deed, dated the 23d of February, 1876, which recites a judgment of the county court, at the August term, 1872, in favor of the state against the two lots, nine and ten, in controversy, assessed for 1871 to Peter Siemers for $58.35 for taxes, penalty, interest, and costs, for 1871; the special execution; the sale by the collector thereunder; the bid of Chambers of the amount $58.35 for the two lots, which was the least quantity bid for; and that they were struck off to him. The deed is in the prescribed form, duly acknowledged, and recorded on the 26th of February, 1876, more than six years before this suit was begun.

This deed was objected to, on the grounds that defendants obtained possession through the vendee of plaintiff Siemers and those holding under him; or else were intruders; that the deed was void, because the lots were not assessed against the owner or apparent owners, or any one in possession; and because the two lots were assessed and sold together, and not separately; because the property was improperly described; and because the property was not subject to taxation against Peter Siemers. These objections were overruled.

Defendant Chambers then testified, that he fenced the property in 1871, and put up the house on it in 1876. He tried in vain to lease the lot from 1870 to 1876. There was a suit for the lots by one Brown and Bunch, and Mrs. Brault claimed possession after Brown was defeated. On the 26th of March, 1876, witness got a quit-claim deed

Digitized by Google

from Bunch, Brault, and Bowner; and Bunch went down and gave witness possession on the part of all three of them. Witness paid taxes since 1872, that is, when they had not been paid. He paid taxes for 1879. Allen had a tax deed for the property. Witness heard he fenced it up. There were posts there when witness put up his fence.

This was all the testimony. No instructions were given. The only declarations of law asked, were the following, asked by plaintiff and refused.

"If, on the 15th of December, 1868, Virginia Brault was in possession of the premises claiming to own the same; and whilst she was in possession said Brault and one Bunch executed and delivered the deed of trust in evidence; and the note secured thereby was assigned and delivered to Siemers; and Siemers afterwards, in June, 1870, executed and delivered to Brault the contract in evidence; and Brault retained possession under the contract, and afterwards assigned and delivered the contract to Nancy Bowner; and afterwards, on the 28th of March, 1876, Bowner, Brault, and Bunch executed and delivered to defendant Chambers a quit-claim deed for, and gave him possession of, the premises; and the sum named in the contract to be paid by Brault to Siemers, or the interest provided for therein are unpaid; and Siemers executed and delivered the quit-claim to his co-plaintiff, the finding should be for plaintiff."

1. So far as paper title goes, it is clear that there was a complete failure to show any such title in plaintiffs. Even if Mrs. Brault were common grantor, no title was derived out of her by the trustee's deed, because the terms of the deed of trust were not complied with as to notice of sale. The sale was made on the nineteenth day after the first insertion of notice. *German Bank* v. *Stumpf*, 73 Mo. 314; Rev. Stats., sect. 3126; *Semple Mfg. Co.* v. *Thomas*, 10 Mo. App. 457.

Digitized by Google

2. There is no evidence that plaintiff Siemers ever had title to, or possession of, the land in controversy. It seems difficult to see, therefore, how, on any view of the effect of the evidence, plaintiffs can derive any help from any doctrine of estoppel. If Siemers, having possession, had surrendered that possession to Mrs. Brault, she, though she had a valid title at the time, might, if she had obtained then a possession which she could not otherwise have got but by litigation, have been estopped to deny Siemers' title when called upon to surrender her possession. It might be a fraud in one who is in possession, under an agreement to purchase which had fallen through, to put the other party to the agreement to establish his title by litigation before he recovered the possession. But there can be no fraud in refusing to surrender possession to one from whom it was not received, and who never had possession, actual or constructive. The agreement in evidence admits no title in Siemers, but supposes that he has none, and that he is about to acquire it. It is admitted that Mrs. Brault was in possession independently of Siemers when he executed the agreement, and she remained in possession after that.

But how does this claim of plaintiffs affect Chambers? It does not appear that Mrs. Brault was his grantor. She was one of three parties of the first part in a quit-claim to Chambers, which seems to have been executed in compromise of some claim that those parties had to the land. She delivered him possession. But so did Bunch, who was also one of the alienors in the quit-claim. Certainly, Chambers was not estopped by buying peace and taking a quit-claim deed. Bunch was not a party to the agreement signed by Siemers, even if it be conceded that under the circumstances Mrs. Brault, though she did not sign, must be held to be so. Bunch was a witness to the instrument, and proved its execution, as he might have been compelled to do. But there is no evidence that he knew what it was about. Bunch,

Digitized by Google

Brault, and Bowner seem to have made some claim to the land at the time they gave their quit-claim to Chambers. What the character of that claim was, we can not even guess. Whether Chambers acquired anything from them or whether he got anything by his tax deed, we need not inquire. Plaintiff must recover upon the goodness of his own title, and not upon the badness of that of defendant.

We are unable to make out any theory of law applicable to the facts in evidence and the record admissions in the case, which would have warranted a finding for plaintiff, and the judgment must be affirmed. All the judges concur.

JOHN R. LIONBERGER, Respondent, v. JOHN BAKER ET AL., Appellants.

14 353
35 661
14 353
41 592

November 20, 1883.

1. JUDGMENTS — ASSIGNMENT OF. — The assignee, for value of a judgment has all the legal remedies for enforcing it which the original judgment creditor had.

2. —— ACTIONS — PARTIES TO. — The purchaser of a judgment who acquires, by sheriff's deed, land sold thereunder may maintain an action to set aside a fraudulent conveyance, by the judgment debtor, of the land, notwithstanding the purchases were made with the money of, and in secret trust for, a third person.

3. FRAUDULENT CONVEYANCES. —A conveyance of property by a debtor who is in failing circumstances, to his daughter for one-fiftieth part of its value is fraudulent and void as to his existing creditors.

4. —— GIFTS — DEBTOR AND CREDITOR. — One whose property is so environed that his creditors can not enforce payment of their demands, can not make a voluntary conveyance which will be good as against his existing creditors.

5. —— That a debtor might, in time and by careful management, realize enough from his property to pay his debts does not place him in a position to make a donation which will be good as against his existing creditors.

6. HUSBAND AND WIFE — NOTICE. — The husband of a grantee in a voluntary conveyance of real estate who, before his marriage, had notice of a

proceeding to set aside the conveyance for fraud, is not a purchaser for value without notice, though there was an oral promise of marriage between him and the grantee, before notice.

APPEAL from the St. Louis Circuit Court, LINDLEY, J. *Affirmed.*

W. H. CLOPTON, with whom is F. F. ESPENCHIED, for the appellants: Lionberger was not the party in interest.—Rev. Stats., sect. 2462; *Williams* v. *Whitlock*, 14 Mo. 560; *Walhomfectel* v. *Dobyns*, 32 Mo. 310; *Hutchins* v. *Weems*, 35 Mo. 285; *Burt* v. *Flournoy*, 4 Mo. 116. In equity, a mere litigious right, the transfer of which would tend to encourage litigation and thus fall within the rule against maintenance, will not be recognized; therefore, the mere right to file a bill in chancery on the ground of fraud, can not be assigned even in equity.—Bispham's Prin. of Eq., sect. 166; 2 Story's Eq. 1040; *DeHoughton* v. *Money*, L. R. 2 Ch. App. 169. In that case the court says: "I do not hesitate to say, that in my opinion, the right to complain of a fraud is not a marketable commodity, * * * such a transaction, if not in strictness amounting to maintenance, savors of it too much for this court to give its aid to enforce the agreement."—*Smith* v. *Harris*, 43 Mo. 557; *Wallen* v. *I. M. R. Co.*, 74 Mo. 522; *Milwaukee R. R.* v. *Milwaukee R. Co.*, 20 Wis. 183; *Prosser* v. *Edmonds*, 1 You. & Coll. 481–499; *French* v. *Shotwell*, 5 Johns. Ch. 566; *McMahon* v. *Allen*, 34 Barb. 56. If a valuable consideration was given, no matter how trivial, if the purchaser is free from fraudulent intent, the conveyance is good.—*Shultz* v. *Brown*, 27 Penn. 123; *Dygert* v. *Remershine*, 32 N. Y. 629–642; *s. c.*, 39 Barb. 417; *Seward* v. *Jackson*, 8 Cow. 430. A voluntary conveyance may become supported by a valuable consideration by matter *ex post facto;* as if it be an inducement to a marriage subsequently contracted; and it appears that if one marries a voluntary donee with knowledge of a voluntary gift or grant previously made, though

Digitized by Google

it was made without any view to marriage, the original donee or grantee becomes a purchaser, and the conveyance can not be disturbed. — *Story* v. *Arden*, 1 Johns. Ch. 261–271; on error, 12 Johns. Ch. 536; *Wood* v. *Jackson*, 8 Wend. 33; *Huston* v. *Cantrell*, 11 Leigh, 137; *Bently* v. *Harris*, 2 Gratt. 357; *Brown* v. *Carter*, 5 Ves. 879.

JOHN D. DAVIS, for the respondent. The mere acceptance of the deed by the daughter, made her a party to the fraud her father was perpetrating against his creditors. — Bump on Fr. Conv. 229, 232, 238. Fraud presumed. — *King* v. *Moon*, 42 Mo. 551. It is not necessary that John Baker should have been insolvent in order to entitle plaintiff to a decree. — Bump on Fr. Conv. 293–294–296–299; *Potter* v. *McDowell*, 31 Mo. 62.

THOMPSON, J., delivered the opinion of the court.

The plaintiff purchased the interest of the defendant John Baker, in the property described in the petition, at an execution sale, and brings this suit in equity to set aside a conveyance of the same made by John Baker, to his daughter, Jessie G. L. Baker, prior to the sale. The plaintiff had a judgment in the circuit court in accordance with the prayer of the petition, and the defendants have appealed. We shall consider in their order the questions to which our attention is invited in the appellants' brief.

1. The first is that the plaintiff is not the real party in interest. It appears that the judgment under which the property was sold was recovered by the Fourth National Bank, of St. Louis, against the defendant John Baker; that this judgment was afterward assigned to the plaintiff; that the property was bid in, at the execution sale, in the name of the plaintiff; that the amount of his bid was credited upon the execution; that the sheriff's deed was made to him; and that he still remains the owner of the legal title. But it also appears that the money, with which the judgment of the Fourth National Bank was purchased, was the money of

Digitized by Google

John D. Davis, Esq., who is not a party to this record, and that the purchase was made; the property bid in at the execution sale, and the sheriff's deed taken by the plaintiff, to hold the property upon a secret trust for Mr. Davis. Upon these facts, we are of opinion that the plaintiff is the real party in interest, within the meaning of section 3462 of the Revised Statutes, and that the action is properly brought in his name. The secret trust or uses upon which he holds the property are of no concern to the defendants. The statute never was intended to prevent the holder of a legal title to land from bringing actions touching the land in his own name.

2. It is next urged that Mr. Davis, if he had sued in his own name, could not maintain this action, because his purchase of the judgment was the purchase of a mere litigious right, which savors of maintenance, and which falls within the rule that the right to complain of a fraud is not a marketable commodity. This argument is not well founded. Our statute (Rev. Stats., sects. 2762–2765), authorizes the assignment of judgments, and gives the assignee any right of action upon the judgment which the assignor would have had. This clearly gives him the right to take any proceedings under the execution issued upon such judgment, or supplemental thereto, which the assignor might have taken. The statute makes a judgment a merchantable property. Any one may buy it who sees fit. It is frequently advantageous to those who have recovered judgments that the law, by distinct expressions, sanctions the right of sale of the same. What the law allows one man to sell, it allows another man to buy, and invests the purchaser with all the legal remedies for the realization and enjoyment of the particular property which it accords to any other owner of the same species of property.

3. The next objection is that the court erred in admitting evidence of any conversation with John Baker, by the witness Simon, after the delivery of the deed to Jessie G. L. Baker, and of facts transpiring after the making of the

Digitized by Google

deed to her. This objection can not be considered, because it was not brought to the attention of the court below in the motion for new trial.

4. The same may be said of the objection that the court erred in admitting the *alias* execution, levy, advertisement, and sheriff's deed. We may add, that while we overrule these two objections, in conformity with a well settled rule of proceedure in this state (*Bevin* v. *Powell*, 11 Mo. App. 216), yet, as this is a suit in equity in which we re-examine the case upon the evidence as chancellors, we shall endeavor to take care that our judgments are not influenced by incompetent evidence.

5. This brings us to the substantial merits of the case. The property in controversy consisted of an undivided one-thirty-sixth part of the estate of Jesse G. Lindell, deceased, which was subject to the life estate of Mrs. Jemima Lindell. The evidence fairly shows that this interest at the time of the conveyance which this suit is brought to set aside, was worth $14,000 or $15,000. It was conveyed on the 27th of July, 1878, by the defendant, John Baker, to his daughter, the defendant, Jessie G. L. Baker, now Antisdel, for the expressed consideration of $100. Without entering with much detail into the evidence as to Mr. Baker's financial condition at the time, we may say that we have carefully considered it, and that it leaves no doubt in our minds that he was greatly embarrassed and insolvent. He was indebted in the aggregate sum of $98,000, exclusive of interest, to various persons in various sums, which were secured by deeds of trust upon his real estate. These deeds of trust covered all the real estate which he owned, except that which is in controversy in this suit. He endeavored to raise money by deeds of trust upon this interest, but failed, in consequence of adverse opinions of eminent lawyers as to whether his interest was vested or contingent. He was, also, at the date of the deed to his daughter, embarrassed by an indebtedness of $12,000 as indorser for

Digitized by Google

his brother Robert upon notes which, at the time, had been protested for non-payment. His condition was such that in the three following months, August, September, and October, suits were instituted against him by three different banks for large sums upon commercial paper upon which he was liable. In the month of September, and within two months of the deed in question, sales took place under deeds of trust of four separate tracts of his property. Following these, at intervals, all of his real estate, except that in controversy, was successively sold under the deeds of trust by which it was incumbered, the amount realized in every case being less than the incumbrance. It is true that Mr. Pitzman and Mr. Lanham, two real estate experts, valued the property thus incumbered to the extent of $98,000, and testified that, with proper management and with time, it might be made to yield $156,000; and that it was worth that sum. We see no reason whatever to discredit this testimony, but it does not at all go to show that Mr. Baker, at the time of this deed to his daughter, was not greatly embarrassed and insolvent. A competent man, with means and with time, could have realized this sum out of this property, or could have made it available to produce such an income as could be produced in this city with good management out of property of the value of $156,000. But the evidence equally shows that Mr. Baker had not the means, nor would his creditors give him the time. He could no longer renew the loans upon the property, as he had done in former years. He could not pay the interest, and the taxes on some of the pieces were in arrears. He could raise nothing upon the uncertain interest which he conveyed to his daughter. In short, it is too clear for further discussion that, in a financial sense, he was literally going to pieces at the time this deed was made; and though he testified that he did not realize his insolvency until the first of January, 1879, something over five months after this deed was made, yet we must take this testimony with all

Digitized by Google

the allowances, and subject to all the observations, which attach to the testimony of fairly credible persons under such trying circumstances; and so taking it, we are bound to consider that, though he may have indulged hopes until the beginning of the year 1879 of extricating himself from his difficulties, he must have realized the facts which actually stared him in the face, and must have felt strongly the force of those facts. What those facts were we have sufficiently indicated.

It is justly argued on behalf of these defendants that this deed, if it falls at all, must fall upon one of two theories: 1. That the conveyance was fraudulently concocted between father and daughter to place the property beyond the reach of the creditors; or (2) that it was a gift from the former to the latter, made under circumstances in which the law will not allow a debtor to give away his property. Upon the first branch of the question the daughter testifies that they lived in affluent circumstances during the year 1878, as they had always done previously; that they had plenty of money; that she supposed her father had plenty of money, and had no knowledge that he was in embarrassed circumstances. We see nothing in the record tending to contradict this, nor do the circumstances of the case suggest any reason to doubt it. The daughter was, at the time when the deed was executed and delivered to her, a young unmarried lady less than twenty years of age, sojourning temporarily with her mother at Oconomowoc, Wisconsin, a small watering-place. There is nothing improbable in the act of a father in concealing his financial embarrassments from a daughter of such tender years, who could not assist him with her counsel or her means, and to whom such a revelation would be a source of unhappiness. We, therefore, put out of the question the idea that this was a conveyance in which the daughter participated with the father in a design of hindering, delaying, or defrauding his creditors.

Digitized by Google

Then was it a gift? The consideration of $100 was so out of proportion to what the testimony shows to have been the value of the property that, assuming it to have been actually paid out of money belonging to the daughter, it is difficult to look upon it in any other light than as a mere colorable consideration. But the evidence as to its payment, I feel bound to say, has had some doubt cast upon it by the conflicting statements of father and daughter, as to the manner of its payment. Both seem to realize the necessity of testifying upon this point in clear and positive terms, and the father says it was paid to him in a single $100 bill, and the daughter says it was paid in bills and silver. Beyond this, the testimony of both tends to show that the daughter received the money from the mother, and the mother received it from the father in the way of pin-money which he allowed her. It is true, that a strong effort is made by Mr. Baker, in his testimony, and the daughter corroborates him on this point, to make it clear that, some years before, he had agreed to allow his wife $2,000 a year, to do with as she pleased, but that he had fallen behind in payments of this allowance, or she, having received it at various times, had given it back to him, so at the time of the making of this deed, he owed her on this account some $700 or $800. But however this may be, we feel bound, as triers of the fact, to take the evidence of this transaction in the light of ordinary experience and subject to all the imputations which such experience justifies, and accordingly to hold that this payment of $100, under the circumstances, was colorable, and that this conveyance was accordingly a gift. It is not necessary to add that the law will not allow a gift made under such circumstances to stand as against a creditor, or against one to whom the law gives the rights of a creditor, whose debt was in existence, as this was, at the time when the gift was made.

6. Finally, the ingenuity of the learned counsel for the defendants has raised an objection which is quite curious,

Digitized by Google

but we think not substantial. After this deed had been made to Miss Baker by her father, and recorded, she became engaged to be married to the defendant James F. Antisdel, who, after his marriage with her, was joined with her as a defendant in this suit. Stating the case most strongly for the defendants, it appears that, at the time she and Mr. Antisdel became thus engaged, he knew that this property had been conveyed to her by her father, but did not know that the conveyance was subject to any infirmities growing out of the father's pecuniary embarrassments at the time, or that it was subject to any equities on the part of his creditors. But it also appears that he knew of the bringing of this suit two days, at least, before his marriage with Miss Baker was solemnized. He testifies that his knowledge of Miss Baker being the owner of this property was one of the inducements which led him to enter into this marriage engagement, but he does not testify that the knowledge that her title was defeasible by her father's creditors would have led him break off the engagement. In point of fact, notice of this suit was served on Mr. Baker and Miss Baker about a month before the marriage of the latter with Mr. Antisdel. Upon these facts, as we gather from the argument and brief of the defendant's counsel, we understand their position to be substantially this: That, a husband being in law entitled to the usufruct during coverture of his wife's real estate and the possession thereof, and marriage being a valuable consideration, in fact the highest consideration known to the law, Mr. Antisdel is to be deemed, in respect of the claim of this plaintiff, a *bona fide* purchaser, without notice, of the land in controversy, and that, such being the case, his equities are superior to those of the plaintiff, and the plaintiff's suit must fail. The cases cited in support of this view are not in point. They simply hold that a gift of realty is converted by a subsequent marriage into a purchase, so as to be good against a subsequent purchaser from

Digitized by Google

the donor without notice of the gift. But the plaintiff does not stand in the position of a subsequent purchaser; he stands in that of a prior creditor whose judgment he has purchased.

But if the defendant Antisdel might, by reason of his intermarriage with Miss Baker, be regarded as a purchaser for value of her real estate, the inquiry would follow, upon this record, What is to be deemed the date of the purchase, the date of the marriage contract, or the date of the solemnization of the marriage? It is essential to this novel defence that counsel should take the position that the date of the purchase should be deemed the date of the marriage contract, which was about six months before the date of the marriage solemnization. But the infirmity of this position is, assuming it to be otherwise well taken, that the marriage contract is not shown to have been in writing; there is not shown to have been any marriage contract in the sense in which that term is used in the English books of equity. But if it were otherwise, if there were in this case a marriage contract, good within the statute of frauds, ante-dating Mr. Antisdel's knowledge of any equities of this plaintiff, or any knowledge of any circumstances which should have put him upon inquiry, and if that contract could be deemed in law a purchase of the property in controversy, yet we do not see how it could be deemed both a purchase and a payment of the purchase-money; and it is well settled that in order to constitute a person a *bona fide* purchaser without notice within the meaning of the rule of equity, which the defendants here invoke, it is not sufficient for him to show that he had no notice at the time of his purchase, but he must also show that he had no notice at the time of the payment of the purchase-money. *Wallace* v. *Wilson*, 30 Mo. 355. The most that can be said in favor of this fantastic analogy, if there is anything in it at all, is that the marriage ceremony is to be deemed the payment of the purchase-money. This being so, Mr. Antisdel,

Digitized by Google

upon his own testimony, had two days' notice of the plaintiff's equities prior to the payment of the purchase-money; and besides, he had been for a month before affected with notice through the doctrine of *lis pendens*. *Buford* v. *Packet Co.*, 3 Mo. App. 159.

On the whole, we see nothing substantial in the defences which have been set up against this action, and in the objections which have been made to the rulings of the circuit court. The judgment is accordingly affirmed. All the judges concur.

ADAM C. DYAS ET AL., Appellants, v. CHRIST HANSON, Respondent.

14 363
38 366

14 363
51 248

14 363
55 62

14 363
59 548

November 20, 1883.

1. COUNTER-CLAIM.—An answer alleging the failure of the plaintiff to present to the drawer a draft delivered by the defendant to the plaintiff for collection states a cause of action arising on contract within the statute of counter-claims.

2. BILLS OF EXCHANGE—SIGHT DRAFTS—PRESENTATION—EVIDENCE.—Evidence of a custom among merchants to deposit in bank drafts which they have undertaken to collect for foreign customers is inadmissible to excuse a failure to duly present a draft for payment.

3. —— AGENCY.—One to whom a draft is given for collection and who deposits it in bank for collection is responsible for the diligence of the bank in presenting the same for payment.

4. —— A sight draft received for collection against a drawee who resides in the same city must be presented before the close of the succeeding day.

5. —— A draft payable at sight must be presented for payment within a reasonable time.

6. —— PRACTICE.—The question as to what is a reasonable time is one for the court after the facts are determined.

7. —— It is error to submit the question of reasonable time to the jury, but it is not ground for a reversal if the finding of the jury is correct.

8. —— BAILMENTS.—A merchant who, in the usual course of business with a customer, accepts, for collection, mercantile paper from the customer

Digitized by Google

according to an established usage between the two, is not a gratuitous bailee.

9. WAIVER. — He who relies on a waiver must show that it was made with knowledge of the material facts.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

THOS. A. RUSSELL, for the appellants: The answer does not set up facts constituting a counter-claim. — *Chaneboret* v. *Cagney*, 10 Abb. Pr. 36; *Edgerton* v. *Page*, 20 N. Y. 285. In pleading a counter-claim the defendant must allege the same facts he would be required to allege if he had himself been suing the plaintiffs. — Bliss on Code Pleading, sect. 367, and cases cited; *Holzbauer* v. *Heine*, 37 Mo. 444; *Vassear* v. *Livingston*, 13 N. Y. 252; *Ritchie* v. *Haywood*, 171 Mo. 362.

BROADHEAD & HAEUSSLER, for the respondent: The facts set up in the answer constitute a cause of action arising on contract. — *Ritchie* v. *Hayward*, 71 Mo. 560; *Curtis* v. *Barnes*, 30 Barb. 225; *McAdow* v. *Ross*, 53 Mo. 199. Drafts payable on demand, and checks, are governed by the same rules of law in respect to presentment, demand and notice. — Bigelow on Bills (1882), p. 80. The general rule in regard to presentment is, that the bill must be presented within reasonable time, and what will be a reasonable time must depend upon all the circumstances of each particular case. — Story on Bills, 231, and cases cited; Bigelow on Bills (1882), p. 207, and cases cited; *Mullman* v. *D. Eguine*, 2 H. Black. 565 (cited at length in Bigelow, 207); *Salisbury* v. *Renick*, 44 Mo. 554. Sight drafts must be presented on the day after their receipt at the place where the drawee resides. — *Harker* v. *Anderson*, 21 Wend. 376; *Rosenblatt* v. *Haberman*, 8 Mo. App. 486. The party relying on a waiver of liability must prove that it was made with a full knowledge upon the part of the drawer of the negligence of the holder. — *Bullin* v. *Betcke*, 11 Iowa, 204; Story on Prom. Notes, sect. 275, and notes;

Digitized by Google

Parsons on Notes and Bills, 601; *Morgan* v. *Peet*, 32 Ill. 281.

Thompson, J., delivered the opinion of the court.

The plaintiffs were wholesale merchants in St. Louis, and the defendant was a merchant doing business in the country. For about two years prior to the transaction in controversy the defendant had been in the habit of making purchases of the plaintiffs from time to time, and of remitting to them for credit upon the running account thus kept up, drafts on other persons for collection. On the 14th of August, 1880, the defendant ordered of the plaintiffs a small bill of goods, amounting to less than $100, and, in a separate letter in the same mail, he sent them a sight draft for $1,100, on the Yeager Milling Company of St. Louis, with this instruction: "Please place same to my credit until called for."

The plaintiffs received these two letters on the 16th of August. They filled the order for the goods, except as to an item of coffee, which they could not fill because they had not the kind ordered. They at the same time placed the draft to the defendant's credit on their books and deposited it for collection in the Bank of Commerce in St. Louis, in which they kept their account. They also, on the same day, advised the defendant that they had received the draft, had placed the same to his credit as requested, and that his order was being filled. This was Monday. The Bank of Commerce allowed the following day, Tuesday, to pass without presenting the draft to the Yeager Milling Company and demanding payment. On that day the Yeager Milling Company was solvent, and if the draft had been presented then, it would have been paid. On Tuesday night the mill of the Yeager Milling Company was destroyed by fire, and the company immediately suspended payment and became insolvent. On Wednesday the draft was presented to the Yeager Milling Company, payment refused, and it

Digitized by Google

was returned by the Bank of Commerce to the plaintiffs, who immediately advised the defendant by telegraph of its dishonor. He having received a letter from the Yeager Milling Company saying that they would pay it in a few days, wrote to the plaintiffs, advising them to hold it and collect it as soon as they could. They held it more than a month, after which further correspondence took place touching it, between them and the defendant, which we need not set out, the result of which was that the defendant refused to allow the draft to be returned to him, and insisted that the plaintiffs were liable to him for the failure to collect it. In the meantime, the defendant had continued to purchase goods of the plaintiffs on credit until he had purchased an amount nearly equal to the amount of the draft.

For the amount of the goods so purchased, the plaintiffs have brought the present suit. The correctness of their account stands admitted. The only defence we have to consider arises on a count of the answer, which sets up by way of counter-claim the damages which accrued to the defendant by reason of the negligence of the plaintiffs, whereby the amount of the draft was lost to the defendant.

1. It is objected that the matter so set up is not within our statute relating to counter-claims. Rev. Stats., sect. 3522. We take a different view. In our opinion, the undertaking of the plaintiffs to collect this draft was a contractual engagement; their failure to do so with reasonable diligence, if such was the fact, was a breach of this engagement, and consequently, the count of the answer setting up such failure presents a cause of action "arising on contract" within the meaning of the statute. *Empire Transportation Co.* v. *Boggiano*, 52 Mo. 294.

2. Then as to the merits of this counter-claim. The plaintiffs offered to prove an universal custom among the wholesale merchants of St. Louis, on receipt of drafts from their customers and others to deposit the same for collection in bank, just as the plaintiffs did, which evidence the court

Digitized by Google

excluded. We think this ruling was right, for two reasons: 1. It was not satisfactorily shown that the defendant had any knowledge of such a custom. A custom to collect drafts in this way might be universal among the wholesale merchants of St. Louis, and a country merchant might know nothing about it. Certainly, the defendant was not bound to know of the existence of such a custom, nor was there any presumption springing out of its universality, that he did know it. Such a custom, even if known to the defendant, would not exonerate the plaintiffs, because a custom which exonerates an undertaker, or contractor, or bailee, from the consequences of his own or his agent's negligence, would not be a good custom. 2. But the evidence of custom, such as was here offered, was wholly irrelevant. It must be borne in mind that the plaintiffs did not offer to prove a custom of banks and collecting agents in St. Louis not to present sight drafts for payment on the day after receiving them; but they offered to prove that it was the universal custom among wholesale merchants in St. Louis, when receiving drafts drawn upon St. Louis, from their customers for collection, to deposit them in bank for that purpose. The defendant might have admitted such a custom without any prejudice whatever to his counter-claim; because the fact that it is customary for a particular class of merchants to select a particular class of agents to discharge a particular kind of duty for them, has no tendency whatever to exonerate such a merchant from his liability for the negligence of such an agent. It would be a new idea in the law which would exempt the principal from liability for the acts of his agent merely upon showing that it was customary to do the particular act through such an agent. Where, from the nature of the act to be done, individuals and corporations are obliged to do it through agents, the law does not thus exonerate them. It is not only a custom for a corporation, for instance, to do all its acts through agents, but from its very nature it can only act through

Digitized by Google

agents; and yet it would be reversing the whole course of modern law on the subject of corporate liability to hold that this necessity should operate to exonerate the corporation from liability for the acts of its agents. The question here was not, whether the defendants were personally negligent in placing this bill of exchange in the hands of the Bank of Commerce for collection. It may be granted, for the purposes of this case, that they were not. But when they selected the Bank of Commerce as their agent for that purpose, they became answerable to the defendant for the diligence of such agent, just as any other principal is answerable for the diligence of his agent; and their own personal diligence was wholly an immaterial question. Such a rule would have exonerated the defendant from liability in the case of *Gerhardt* v. *Boatmen's Saving Institution* (38 Mo. 60); because, without doubt, an universal custom, universally known, could have been shown on the part of banks to resort to a notary for the purpose of making demand of the payor of matured paper, and of giving notice to drawers and indorsers. Indeed, such a defence was set up in a case in New York, but without avail. That court said: "It was proved in the progress of the trial that it was usual for bankers to resort to a notary; but there was nothing to show that the custom affected or varied the legal liability of the bank, or its liability for the due performance of all the acts necessary. There was evidence from others that the custom was uniform to hand them to a notary. But practice and usuage of business adopted for their own convenience can not vary the contract between them and their dealers." *Ayrault* v. *Pacific Bank*, 47 N. Y. 574. As this evidence was properly excluded, the instruction which the plaintiffs asked relating to such a custom was, of course, rightly refused.

3. The court instructed the jury in substance that it was the duty of the plaintiffs to present the draft for payment within a reasonable time, and that, if they failed to present

Digitized by Google

it within a reasonable time, the loss arising out of the failure to collect it must fall upon them. The general rule with regard to the presentment of bills payable at sight is that they must be presented within a reasonable time. *Salisbury* v. *Renick*, 44 Mo. 554. The court, in this case, in effect left it to the jury to say whether the draft had been presented within a reasonable time. We do not understand that this part of the instruction is complained of. It is suggested by the learned counsel for the defendant, on the authority of *Fugitt* v. *Nixon* (44 Mo. 295), and *Bank* v. *Penderoff* (13 Wend. 137), that the question of reasonable diligence in making demand of payment of commercial paper is a mixed question of law and fact, to be decided by the jury. It is, indeed, said by Wagner, J., in the former case: "The presentment of a draft to the drawee must be made in a reasonable time. What is a reasonable time is a question of fact, and depends upon the circumstances of the case." We do not understand that this case goes the length of holding that the question, what is a reasonable time for the presentment of commercial paper is a question which, in all cases, is to be left to the jury. The question would seem in reason to stand on the same footing as the question, what is a resonable time within which to give notice of the dishonor of a bill of exchange or a promissory note to the drawer or indorser; and upon this question, in the same case, the same learned judge proceeds to show that "what is due diligence in giving notice of dishonor is a question of law, where the facts are admitted." And the court proceed to examine the facts of the particular case, and conclude that due diligence had not been used. *Fugitt* v. *Nixon*, *supra*. The latter of the above cases, *Bank* v. *Penderoff* (*supra*), seems to be one of a limited number of cases which hold that the question, what is reasonable diligence in presenting commercial paper for payment, is a question of fact for the jury. There is, indeed, some conflict of judicial opinion on the question; but the

Digitized by Google

better opinion, supported by the decisions of the best courts and the opinions of the most approved writers on negotiable paper, is that, where the facts are clear and uncontradicted, the question is one of law, to be decided by the court. *Prescott Bank* v. *Caverly*, 7 Gray, 217; *Aymar* v. *Beers*, 7 Cow. 705; *s. c.*, 17 Am. Dec. 533; *Mohawk Bank* v. *Broderick*, 10 Wend. 304; *Gough* v. *Staats*, 13 Wend. 549; Dan. Neg. Inst., sect. 466; Byles on Bills, 163; Edwards on Bills, 391. And so as to the time of giving notice of dishonor. *Brenzer* v. *Wightman*, 7 Watts & S. 264; *Bank of Columbia* v. *Lawrence*, 1 Pet. 578, 583. This view is much to be preferred, because it results in giving the mercantile community definite rules by which to govern their actions, instead of remitting the question to the uncertain discretion of juries. We think then that it was erroneous, in the clear state of the evidence in this case, to leave the question to the jury; but this will not be ground for reversing the judgment, if the jury have decided the question rightly; and this is the next point which we shall consider.

The jury must have found that where a bank receives a sight draft for collection, drawn upon a party having a place of business in the same city in which the bank is situated, the bank does not use due diligence if it fail to present the draft to the drawee for payment before the close of the following day. We are of opinion that this conclusion was right as matter of law. It was so held by this court in the case of a bank check in *Rosenblatt* v. *Haberman* (8 Mo. App. 486). And, although there has been considerable difference of opinion, whether the same measure of diligence is required in the presentment of sight bills of exchange as in the presentment of bank checks, the better opinion seems to be that there is no sound reason for a distinction. "The fact that one instrument is drawn upon a bank and the other upon an individual can make no difference in principle concerning the duty of the holder; what will be due diligence in the one case will be due dili-

Digitized by Google

gence in the other. *Smith* v. *James*, 20 Wend. 192; *s. c.*, 32 Am. Dec. 527, per Bronson, J. This distinction was adverted to by our supreme court in *St. John* v. *Homans*, (8 Mo. 382, 385), where Scott, J., said: "It must be confessed that the inclination of the authorities tends to the support of the principle that bills of exchange and checks are alike in all respects and that the holder of a check is bound to the same diligence as the payee or indorser of a bill of exchange." And he refers to *Harker* v. *Anderson* (21 Wend. 372), as containing all the learning on the question. The question under consideration in *St. John* v. *Homans* related to a bank check, and Scott, J., proceeded to say: "Had it been a bill of exchange, it would have been the duty of the payee to have presented it for payment the day after it was received." We have no doubt that this *dictum* announced the correct rule. If a delay of a full day, without any excuse therefor, could be indulged by the law, it is difficult to suggest a principle that would not grant the indulgence of a second or even of a third day; the question would be only a question of degree. The line must be drawn somewhere, and the rule which draws it at the close of the day succeeding the receipt of the paper, in the absence of special circumstances of extenuation, is wise, safe, and certain. The jury were, therefore, right in their conclusion upon the question of diligence in this case, and their verdict cured the error of the court in submitting the question to them.

4. The argument of the plaintiffs' counsel that the plaintiffs exonorated themselves by placing the draft in the bank for collection is, in our judgment, untenable. The defendant was absent; he had committed a very important matter of business to them, according to his previous course of dealing with them. They were on the ground, and might have demanded payment on the very day the draft was received, which was two days before the bank demanded it. Instead of doing this, they selected their

Digitized by Google

own method and their own agent for making the collection. The circumstance that the agent they thus selected was a bank does not, upon any principle with which we are acquainted, exonerate them from liability for the negligence of the bank. They are as much answerable for such negligence as they would have been answerable for the negligence of one of their own clerks, to whom they might have committed the same matter of business. It is argued that they are entitled to invoke the rule which has been declared by our supreme court with reference to the liability of banks acting as collecting agents, which exonerates a bank receiving a draft *upon a distant place* for collection, upon the bank showing that it had used due diligence in selecting the proper agent to perform the duty. *Daly v. Butcher and Drovers' Bank*, 56 Mo. 94. The opinion of the court in the case just cited shows that the rule there laid down has no application to the case where a bank receives a note or bill of exchange, for collection from a payor who resides at the same place where the bank is located. In such a case, the collecting bank is liable for the default of the agent to whom it chooses to confide the duty of making the demand upon the payor or drawer. *Gerhardt v. Boatmen's Saving Inst.*, 38 Mo. 60; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243.

It is claimed by the learned counsel for the plaintiffs, that, in respect of the diligence required of the plaintiffs in presenting this bill of exchange they were subject to a less onerous rule of liability than a bank would have been subject to under like circumstances. It is urged that they are in the position of gratuitous bailees, and, accordingly, that the instruction given for the defendant does not state the law correctly, in its application to the facts of the case; because it assumes that the defendant was a regular customer, dealing continuously with the plaintiffs, and, that, by virtue of this fact, he had a right to require at their hands the collection of drafts sent to them, without compensation.

Digitized by Google

This instruction was as follows: "If it appears from the evidence that the defendant had been dealing with plaintiffs in the purchase of goods for the period of two years, and that defendant was also in the habit of paying for his goods partly in drafts on other persons from time to time, and also of sending drafts on other persons in St. Louis to plaintiffs for collection, and the plaintiffs had been in the habit of collecting the same for defendant from time to time, then it was the duty of plaintiffs to present the draft for payment in a reasonable time, whether the same was sent by defendant to plaintiffs to be applied wholly or in part to the payment for a bill of goods then due or to become due, or was simply sent for collection, the amount to be placed to defendant's credit; and if the plaintiffs failed to present the same within a reasonable time, and in consequence thereof the amount could not be collected, then the loss must fall on the plaintiffs."

We think the instruction entirely correct, both in the abstract, and in its application to the evidence. The evidence unquestionably showed a course of business continuing for two years by which the defendant had purchased goods of the plaintiffs on running account, and had transmitted drafts and checks to them for collection and credit on his side of the account. The fact that the account had been balanced and settled ten days before the draft in controversy was sent for collection had no tendency whatever to show a cessation of this course of business. Such a settlement might take place several times in the course of a year between prudent business men, and the general course of business would be immediately resumed as it had gone on before. This defence was urged in the leading case of *Allen* v. *Merchants' Bank* (22 Wend. 215; *s. c.*, 34 Am. Dec. 289), and it was disposed of by Senator Verplanck in the following language: "It is well settled in this State that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take

Digitized by Google

the necessary measures to charge the drawer, maker, or other proper parties upon the default or refusal to pay or accept. *Smedes* v. *Bank*, 20 John. 372; and *s. c.* in this court, 3 Cow. 663; *McKinster* v. *Bank*, 9 Wend. 46; *s. c.*, 11 Wend. 473. The ground of this rule is, that the acceptance of negotiable paper thus deposited for collection forms an implied undertaking to make the demands and give the notices required by law or mercantile usage for the perfect protection of the holder's rights against all previous parties, for which undertaking the use of the funds thus temporarily obtained, or of the average balances thereof, for the purposes of discount or exchange, forms a valuable consideration. Had we no express authority on this head, I should consider the acceptance by a bank of paper for collection from a customer in the usual course of his business as sufficient evidence of a valuable consideration. The whole ordinary business of a bank with its dealers is one of mutual profit or accommodation, and must be taken together (unless some part is separated by express understanding), and it is not for a bank to allege or for a court to consider (as the chief justice seems to do) that a collection in a particular place must be regarded as a gratuitous favor. If accepted at all, the general profits and advantages of the business of which this may perhaps be an unproductive part, form a good consideration for the undertaking. This, however, is not an open question, after the decision of this court in the two cases against the bank of Utica." This language was quoted at length, with approval, by our supreme court, in the case of *Gerhardt* v. *Boatmen's Saving Institution* (38 Mo. 60, 64), and it may with equal propriety be applied to the facts of this case. The plaintiffs and the defendant were dealing together in a continuous course of business, and their relations with each other were not unlike those of a bank with its customers. It was a business of mutual profit and accommodation. The depositing of a single bill of exchange by the defendant

Digitized by Google

with the plaintiffs for collection, is not to be singled out and viewed as an isolated fact; but the whole course of their business is to be taken together, and when so taken and considered, it is not for the plaintiffs to allege, or for a court of justice to hold, that the receiving and collecting of a bill of exchange is to be regarded as a gratuitous favor. "If accepted at all, the general profits and advantages of the business of which this may perhaps be an unproductive part, form a good consideration for the undertaking."

5. Another question is, whether the defendant has waived his right of action against the plaintiffs for their failure seasonably to collect this draft. It does not appear that when the defendant, on the 20th of August, wrote to the plaintiffs advising them to hold the draft and collect it as soon as they could, he had any knowledge that they had been guilty of any laches in presenting it. Such an instruction, then, can not be construed as a waiver; the rule being that a party relying upon a waiver of liability must prove that it was made with full knowledge of the facts by the party who thus releases his rights. *Commercial Bank* v. *Perry*, 10 Rob. (La.) 61; *s. c.*, 43 Am. Dec. 168; *New Orleans Savings Bank* v. *Harper*, 12 Rob. (La.) 231; *s. c.*, 43 Am. Dec. 226; *Fleming* v. *McClure*, 1 Brev. 428; *s. c.*, 2 Am. Dec. 671; *Tickner* v. *Roberts*, 11 La. 14; *s. c.*, 30 Am. Dec. 706.

6. It was within the sound discretion of the court to allow the defendant to amend the count of his answer which embodied this special defence, by calling it a counter-claim instead of a plea of recoupment. We think the judgment ought to be affirmed. It is so ordered. All the judges concur.

Digitized by Google

14 376
104m245
14 376
119m315
14 376
88 205

MOSES LAMPERT, Respondent, *v.* LACLEDE GAS-LIGHT COMPANY, Appellant.

November 20, 1883.

1. DAMAGES — NEGLIGENCE — PUBLIC CONTRACTOR. — A contract with a municipality for the repairing of street lamp posts and lighting the lamps raises a public duty on the part of the contractor to be performed for the benefit of the citizens of the municipality distributively.

2. —— PLEADING. — A recovery may be had by one who has been injured by reason of the negligent non-performance of such duty, in an action which proceeds as for a non-performance of public duty and which sets up the contract by way of inducement.

3. NOTICE — MASTER AND SERVANT. — Notice to a servant of a corporation which will affect the corporation must be shown to relate to something within the scope of the servant's duty.

4. —— Fifteen minutes from the time at which a lamp-lighter completed the lighting of the lamps, held not to be a reasonable time within which to give notice to the corporation of the fall of a lamp post, under the circumstances of the case.

5. —— PRACTICE — The rule that an appellate court will not review questions determined on a former appeal, does not apply when questions presented on the former appeal were not considered.

APPEAL from the St. Louis Circuit Court, ADAMS, J. *Reversed and remanded.*

C. & C. E. GIBSON, for the appellant: A mere subordinate employe can not bind the corporation which employs him, in all respects and at all times, by knowledge which he may acquire. — *Maupin* v. *Mining Co.*, reported in *addendum* to Cent. L. J., of July 20, 1883; Wharton on Agency, sects. 178–673; Story on Agency, sect. 140; Ang. & Ames on Corp., sect. 308. A plaintiff can not avail himself of the provisions of a contract unless he is individually a party to the contract. — *Necker* v. *Harvey*, Cent. L. J., Feb. 9th, 1883; *Davis* v. *Clinton Water-works*, 54 Iowa, 59; *Atkinson* v. *Newcastle Water-works*, 2 Excheq. Div. 441; *Nickerson* v. *Hydraulic Co.*, 46 Conn. 24; Wharton on Neg., sects. 439, 440, 441; *Bissell* v. *Roden*, 34 Mo. 63; Sher. & Redf. on Neg., p. 68, sect. 54; *Winterbottom* v. *Wright*, 10 Mees. & W. 109; *Langmeid*

Digitized by Google

v. *Halliday*, 6 Exch. 761; *Heanen* v. *Pender*, L. R. 9 Q. B. Div. 302; *Losee* v. *Clute*, 51 N. Y. 474. The duty of keeping the streets clear and free from such obstructions was an obligation undoubtedly imposed upon the city (*Welsh* v. *City*, 73 Mo. 74); but no such duty ever attached by law to the defendant or any individual citizen, in case of obstructions accidentally thrown in the street. — *Kirby* v. *Market Association*, 14 Gray, 249; *Jamison* v. *Atchison*, 16 Kan. 358; *Eustis* v. *Johns*, 38 Cal. 3; *Heeney* v. *Sprague*, 11 R. I. 456; *Vandyke* v. *Cincinnati*, 1 Disney, 532; *Flynn* v. *Canton Co.*, 40 Md. 312.

W. H. CLOPTON, for the respondent: The question of the sufficiency of the petition herein is *res adjudicata*. Defendant contended below that the city could not shift its liability to keep the streets, etc., in repair. We concede that it could not, so as to escape liability, but we contend that defendant *quoad hoc* was a joint tort-feaser. — *Buesching* v. *St. Louis Gas Co.*, 73 Mo. 219; *Blake* v. *City*, 40 Mo. 571. Joint tort-feasors. — 2 Thomp. on Neg., 891, 892; *Id.* 789, and cases cited; Wharton on Neg., sect. 395; *Klauder* v. *McGrath*, 35 Pa. St. 128; Sher. & Redf. on Neg., sect. 56; *Irwin* v. *Fowler*, 5 Robt. 482. The defendant is liable for non-feasance as well as for misfeasance. Sherman & Redfield on Negligence (sect. 353), use this language: "One who legally contracts with the public authorities to keep in repair a highway, canal, or other public work is liable to any one who is specially injured by his omission to perform his contract, or his negligent performance thereof." — *Robenson* v. *Chamberlain*, 34 N. Y. 389; *Fulton F. Ins. Co.* v. *Baldwin*, 37 N. Y. 648.

THOMPSON, J., delivered the opinion of the court.

This cause was before this court at a former term. 12 Mo. App. 576. The plaintiff had recovered a judgment against the defendant, and we reversed the same, on the ground that the case had been put to the jury upon errone-

Digitized by Google

ous instructions. It has again been tried, and the plaintiff has again recovered a judgment.

We are now asked by the learned counsel for the appellant to consider the question of the sufficiency of the petition, a question which was not considered by this court on the former appeal. On the other hand, it is urged that what was considered and decided on the former appeal necessarily involved an adjudication of the sufficiency of the petition in favor of the respondent. We do not gather from the briefs which were filed at the hearing of the former appeal that our judgment upon this question was distinctly asked by either party. If it had been asked, and had not been given, for reasons which were satisfactory to us then, we should not now be precluded from considering it by any rule of procedure with which we are acquainted. A court will not, on a second appeal, as a general rule, allow a question to be reopened and discussed which was decided at the former appeal. *Lesinsky v. Dispatch*, 13 Mo. App. 576; *Metropolitan Bank v. Taylor*, 62 Mo. 338. But this principle has no application to questions which, though presented, were not considered on the former appeal. Such an application of the rule would be unjust. It would conclude, against the rights of a party who had invoked the decision of the court upon a meritorious question, the question itself, without the court ever having really examined or decided it. *State ex rel. v. Garroutte*, 67 Mo. 445. We, therefore, conceive it to be our duty to consider whether a cause of action is stated by the petition.

The petition reads as follows: "Plaintiff, for amended petition, filed by leave of court, states that, at the times hereinafter mentioned, the defendant was a corporation, incorporated under the laws of the state of Missouri; that at said times the city of St. Louis had, by its charter, power to light the streets in said city and keep the same and the sidewalks in repair, and it was the duty of said city to keep said streets and sidewalks in a safe condition for persons

Digitized by Google

passing along them; that the said city had at said times power to contract with persons or corporations for lighting the streets in said city; that on and before the 10th day of September, 1880, Eighth Street and Wash Street were public streets in said city; that on the 28th day of February, 1873, the defendant, the Laclede Gas-Light Company, entered into a contract with said city of St. Louis, whereby said Gas-Light Company agreed with said city to keep in good repair and supply all the public lamps, lamp posts, and burners then erected or thereafter to be erected in that part of the city of St. Louis lying north of Washington Avenue, and that said Gas-Light Company would light said lamps one-half hour after sunset of every day except when the clear moon light rendered it unnecessary.

"That, prior to said 10th day of September, 1880, there was a public lamp post and lamp on the southwest corner of said Eighth and Wash Streets, which is north of said Washington Avenue; that, on the afternoon of that day, said lamp post and lamp fell across and on the pavement or sidewalk of said corner of Wash Street and Eighth Street, and was carelessly and negligently allowed by defendants to remain on and across said sidewalk and pavement until and during the night of said 10th of September, 1880; that said lamp post and lamp obstructed the way on said sidewalk, and that no lamp was lighted by defendant, although there was no moon light, nor was any guard or warning placed on or near said obstruction, although said defendant had notice that said lamp post and lamp had fallen across and were lying on said sidewalk.

"Plaintiff says that on the night of September 10, 1880, it being then and there very dark, he was walking along said pavement at said corner of Wash and Eighth Streets, and, without fault or negligence on his part, but by reason of the said fault, negligence, and carelessness of defendant as aforesaid, plaintiff stumbled over said lamp post and fell,

Digitized by Google

and did then and there greatly lacerate, hurt, and wound one of his legs; and thereby plaintiff became and was sick, sore, is now, and will permanently remain, sore and lame.

"That he has been since said date, and always will be, prevented by said injury from performing and transacting his usual work and business; that he has been put to great expense in and about attempting to be cured of said injury, to-wit: the sum of $100, and he has by reason of the premises been otherwise damaged in the sum of $5,000, for which sums, and for his costs, he asks judgment."

It will be perceived that this petition in effect declares against the defendant upon a contract which the defendant had made with the city for keeping certain public lamp posts in repair, and asks for damages which the plaintiff is alleged to have sustained through a negligent breach on the defendant's part of this contract. And the question is, whether this contract raised such a duty on the part of this defendant toward the public generally that an action would lie against it by any person who might be injured through its non-feasance in failing to comply with the same. Fifty years ago such a question would not have admitted of much debate in a court of common law. The general rule of that law was that actions upon contracts can only be maintained by the parties to the contract or by their representatives. This question underwent consideration before that very learned and able lawyer, Mr. Baron Parke, in the case of *Langridge* v. *Levy* (2 Mees. & Wels. 519; affirmed in Exch. Cham., 4 Mees. & Wels. 337). There, a father purchased a gun to be used by himself *and his sons*, which the vendor warranted to be good and safe. While in use by one of his sons, it burst, in consequence of being defectively constructed, and the son was thereby injured. It was held that the son was entitled to maintain an action against the vendor of the gun. But Baron Parke, in giving his judgment in the court of exchequer, distinctly denied the principle for which the plaintiff's counsel contend, namely, that

wherever a duty is imposed on a person, by contract or otherwise, and that duty is violated, *any one* who is injured by the violation of it may have a remedy against the wrong-doer. He declined to lay down a principle which would lead to such an indefinite extent of liability; but he said: "We decide that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was, either directly or indirectly, communicated, and for whose use he knew it was purchased." In a later case in the court of exchequer, it was well said by Mr. Baron Cleasby that, in a case presenting appropriate facts, the word "negligence" might be substituted for "fraud." Accordingly, where a person purchased of a chemist a bottle of hair-wash to be used by his wife in dressing her hair, and his wife used it and thereby received injuries in consequence of its deleterious character, it was held that she was entitled to recover damages of the chemist. *George* v. *Skivington*, L. R. 5 Exch. 1. These cases, it will be perceived, proceed upon an idea somewhat analogous to the idea of privity of contract. The person injured who was held entitled to maintain an action, was the person *for whose use* the defendant had knowingly sold the goods to a person not a party to the suit. This being so, the right of action of the beneficiary in the contract of sale was held to be the same as that of the vendee would have been if he had sustained the like injury.

The idea that there must ordinarily in these cases be a privity of contract in order to support the action is illustrated by another decision of the court of exchequer in 1842, in which all the four judges were very clear as to the result reached. The facts were that A had contracted with the postmaster-general to provide a mail coach for the purpose of conveying mail bags along a certain route; that B and others had agreed to horse the coach along the same route, and had hired C to drive the same; that while C was driving the same it broke down from latent defects in its construction, and C was injured. It was held that

Digitized by Google

C could not recover damages of A, because there was no privity of contract between them. *Winterbottom* v. *Wright*, 10 Mees. & Wels. 109. This decision has been much cited by American courts, and always, so far as I know, with approval. The same result, upon analogous facts, was reached in *Cook* v. *Dry Dock Co.* (1 Hilt. 436. See, also, *Davidson* v. *Nichols*, 11 Allen, 514.)

Whether we ought to be restricted to the same rule is rendered doubtful, when we consider the fact that our courts proceed upon much broader views in allowing third persons, for whose benefit contracts have been made, to maintain actions upon the same. Our code (Rev. Stats., sect. 3462), has so far changed the rule of the common law as to allow the beneficiary in a contract to bring an action at law in his own name to enforce the same; and our courts have gone so far in extending this beneficial provision, as to hold that it is not always necessary that the party suing should have been named as a beneficiary in the contract sued on, or that he should have been in the contemplation of the contracting parties at the time when the contract was made. It is sufficient that he has succeeded in some way to the rights of the obligee in the contract, so that the right of demanding its performance, in whole or in part, has accrued to him. This may be illustrated by a line of decisions in this court, which hold that the drawee of a check upon a bank may maintain an action against the bank upon its refusal to pay the same, if the circumstances were such that the drawer might have maintained the action. *McGrade* v. *German Savings Inst.*, 4 Mo. App. 330; *Zellee* v. *German Savings Inst.*, 4 Mo. App. 401; *Senter* v. *Continental Bank*, 7 Mo. App. 532; *State Savings Association* v. *Boatmen's Saving Bank*, 11 Mo. App. 292.[1] Another line of decisions in our courts well illustrates the same rule. The sheriff, in this state, gives a bond to the state, conditioned for the faithful discharge of his duties.

[1] These decisions have since been overruled by the supreme court. — REP.

Digitized by Google

Rev. Stats., sect. 3881. Actions on such bonds are brought in the name of the state to the use of any party injured by the breach of the same. *The State to use* v. *Davis*, 35 Mo. 406. A similar rule obtains with reference to the bonds of administrators, although here the action is given by statute to the person injured by the breach of the bond, proceeding in the name of the state. *The State to use* v. *Campbell*, 10 Mo. 724. But these and other like decisions seem to proceed upon the idea that the party suing has been brought into a relation of privity under the contract with the party sued, either by being expressly named in the contract as his beneficiary thereunder, or by an assignment of the rights of the obligee thereunder, which may take place either by the act of such obligee himself, or, in case of his death or bankruptcy or otherwise, by operation of law.

But these cases do not afford us substantial aid in determining the case under consideration; because there is nothing in this case which can be called a privity of contract between the plaintiff and the defendant, either under the English rule or under the rule which obtains in this state. The plaintiff is not named as the beneficiary in the contract described in the petition, nor does he belong to the class of persons who are named as beneficiaries in this contract, nor is he the assignee in whole or in part of the rights of the city of St. Louis thereunder, either by an act of the city of St. Louis, or by operation of law. He stands as an entire stranger to the contract. This is seen by his learned counsel, who argues that the action is not a suit upon the contract, but an action *ex delicto*. If this position is well founded, it rests upon another idea which we shall now proceed to consider.

That idea is this: That the rule which requires privity of contract in order to support an action does not always apply where the duty which is undertaken by the contract is a *public duty*, to be performed by the obligor in the contract for the benefit of the public generally, or for the ben-

Digitized by Google

efit of particular members of the public distributively. This distinction, was clearly recognized in the case of *Winterbottom* v. *Wright* (10 Mees. & Wels. 109) where the boundary line excluding this class of actions was said to be this: That where there is no privity of contract between the plaintiff and defendant, and no public duty has been broken by the latter, the plaintiff can not recover. On the other hand, it does not follow that because a public duty has been broken, any person who is thereby damaged may have a right of action against the party who had undertaken the duty. There is, it is to be regretted, a great want of harmony in the adjudications upon this question. It may facilitate our examination of it to get one branch of it out of the way, by saying that where the act complained of is an act of *misfeasance*, as distinguished from an act of non-feasance, the party guilty of the act, although engaged in the performance of a public duty at the time when he committed it, is unquestionably liable to the party injured. Thus, an overseer of a highway may not be, and in many jurisdictions is not, liable to a traveller for an injury which may happen to him through a neglect of said overseer to keep the highway in repair. *Bartlett* v. *Crozier*, 17 Johns. 438 (reversing *s. c.*, 15 Johns. 220); *Garlinghouse* v. *Jacobs*, 29 N. Y. 297; *Young* v. *Commissioners*, 2 Nott & M. 538; *Nobles* v. *Langley*, 66 N. C. 287; *Tyson* v. *Commissioners*, 28 Md. 510; *Walter* v. *Commissioners*, 35 Md. 385; *Ball* v. *Winchester*, 32 N. H. 435. But where such a public ministerial officer, in prosecuting a work which the law governing his office requires him to do, inflicts an unnecessary injury upon another, either through negligence or malice, he can not justify the act as an act done within the scope of his jurisdiction or authority; nor is it deemed an act of mere omission or non-feasance, to be redressed by a public prosecution, but an act of personal misfeasance, for which he must pay the resulting damages. *Shepherd* v. *Lincoln*, 17 Wend. 250; *Leader* v.

Digitized by Google

Moxon, 3 Wils. 461; *s. c.*, 2 W. Bl. 924; *Tearney* v. *Smith*, 86 Ill. 391; *Elder* v. *Bemis*, 2 Metc. 599; *Roberts* v. *Read*, 16 East, 215. Nor is his liability diminished, except perhaps in respect of exemplary damages, by the fact that in doing the act he proceeded in an honest endeavor properly to discharge the duties of his office, provided the act was one which is essentially unlawful and invasive of private right, and from which damage has ensued to another. *McCord* v. *High*, 24 Iowa, 336; *Tearney* v. *Smith*, 86 Ill. 391; *Conwell* v. *Emric*, 4 Ind. 209; *Hicks* v. *Dorn*, 44 N. Y. 47; *Elder* v. *Adams*, 2 Metc. 599; *St. Peter* v. *Denison*, 58 N. Y. 416. Nor does it make any difference upon principle that the public body which he represents (as in a case where it is a municipal corporation), is also liable. *Harriman* v. *Stowe*, 57 Mo. 93, 99; *Wright* v. *Wilcox*, 19 Wend. 343; *Lane* v. *Cotton*, 12 Modern, 472; *s. c.*, 1 Ld. Raym. 646, 655; *Cary* v. *Webster*, 1 Stra. 480; *Montford* v. *Hughes*, 3 E. D. Smith, 591; *Suydam* v. *Moore*, 8 Barb. 358; *Phelps* v. *Wait*, 30 N. Y. 78. See *Whittamore* v. *Waterhouse*, 4 Car. & P. 383.

But where the injury complained of results from a nonfeasance, that is, a failure to perform a public duty assumed by contract, where he is a public contractor, or a public duty, imposed upon him by the law governing his office and assumed by his acceptance of the office, where he is a public officer, the authorities are conflicting. If the rule which obtains in the case of the liability of private agents could always be applied here, there would not be so much difficulty. "The agent," says Mr. Justice Story, "is personally liable to third persons for his own misfeasances and positive wrongs; but he is not, in general (for there are exceptions), liable to third persons for his own non-feasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons;

Digitized by Google

but the privity exists only between him and his principal." Story on Agency, sect. 308. This rule, it must be allowed, still holds good in a large measure in respect of the liability of public contractors and public officers for mere non-feasance or omissions of duty, so that it may perhaps still be said that for these things the duty violated is a duty which the officer owes to the state or to the municipal corporation whose officer he is, and that he is answerable, only to the public for a non-performance of the same, by indictment, information (*Rex* v. *Antrobus*, 2 Ad. & El. 794), impeachment, or ortherwise, as provided by law. The policy of strictly holding such contractors or officers to the performance of their public duties has frequently resulted in the enactment of statutes giving actions *qui tam* to private informers (as in *McFadden* v. *Kingsbury*, 11 Wend. 667); but here the plaintiff does not proceed upon an injury to him through the non-performance of the duty; he rests his right of action simply upon the statute.

The books afford frequent illustrations of this doctrine. A policeman goes to sleep upon his beat, and, in consequence of this failure of duty, a burglary is committed. The person whose house is broken into can not maintain an action against the policeman, but the municipal corporation can punish the latter for his neglect of duty. *Green* v. *Kennedy*, 46 Barb. 16. A surveyor of a highway neglects to keep the same in repair, and a traveller is injured. The traveller has no right of action against him. *Young* v. *Davis*, 7 Hurl. & N. 760 (*s. c.* affirmed in Exch. Cham. 2 Hurl. & Colt. 197); *Bartlett* v. *Crozier*, 17 Johns. 438 (reversing *s. c.*, 15 Johns. 220); *Garlinghouse* v. *Jacobs*, 29 N. Y. 297; *Young* v. *Commissioners*, 2 Nott & M. 538; *Nobles* v. *Langley*, 66 N. C. 287; *Tyson* v. *Commissioners*, 28 Md. 510; *Walter* v. *Commissioners*, 35 Md. 385; *Ball* v. *Winchester*, 32 N. H. 435. On the same principle, military commanders are not, in general, responsible to third persons for acts done within the line of their duty or in

Digitized by Google

execution of their orders. *Hough* v. *Hoodless*, 35 Ill. 166; *Wall* v. *McNamara*, MS. cited in 1 Term Rep. 502, 536; *Wall's Case*, 28 How. St. Tr. 144, 176; *Luther* v. *Borden*, 7 How. 46; *Dinsman* v. *Wilkes*, 12 How. 403; *Wilson* v. *McKenzie*, 7 Hill, 95; *Fisher* v. *McGirr*, 1 Gray, 45; *Dynes* v. *Hoover*, 20 How. 80, 81; *Ex parte Watkins*, 3 Pet. 208; *Wise* v. *Withers*, 3 Cranch, 337; *Wolton* v. *Gavin*, 16 Q. B. 52.

On the other hand, there is a class of officers who, under the law governing their offices, assume, by accepting their offices, duties towards the public distributively, to be performed on request of any person who may apply therefor, either with or without the payment of a prescribed fee. To this class belong sheriffs, coroners, constables, inspectors of meats, and the like. At the same time, some of these officers, as for instance sheriffs and constables, act in a relation where the duties which they perform are strictly duties which they owe to the public in its aggregate or corporate character, that is to the state or municipal corporation whose officers they are.

The distinction between these two classes of duties may well be illustrated by the case of a sheriff. If the sheriff negligently fails to call out the power of the county to suppress a riot, and in consequence of this a person is injured, such person can unquestionably maintain no action against the sheriff, for the duty which the sheriff has violated was a duty which he owed to the state, that is the public collectively, and not to the public distributively. But if one who has recovered a civil judgment against another take out a writ of *fieri facias*, and place it in the hands of the sheriff for execution, and he fail through negligence to execute the same, he is liable to the person who has thus requested of him the performance of his duty. As to a like liability on the part of recorders of deeds, see *Houseman* v. *Girard, etc., Asso.* (81 Pa. St. 256); *McCar-*

Digitized by Google

aher v. *The Commonwealth* (5 Watts & S. 21); *The Commonwealth* v. *Harmer* (6 Phila. 90).

The principal conflicts presented by the decisions in respect of the liability of public officers and public contractors to third persons for non-feasance relates to the very subject we are considering — the liability of overseers or surveyors of highways, or contractors for the building of bridges or the repairing of canals, and of the incorporated trustees of docks, harbors, or other public works. Thus, the principle that an overseer of highways is not liable for damages sustained by a third person, through his neglect to keep the highway in repair, was declared in New York, at an early day, in an opinion enforced by the learning and authority of Chancellor Kent, sustained by the unanimous concurrence of the members of the Court for the Correction of Errors. *Bartlett* v. *Crozier*, 17 Johns. 439 (reversing *s. c.*, 15 Johns. 250). But this principle was found to work such great inconvenience to private rights that the court of appeals in that state refused to extend it so as to exempt from liability to such action canal contractors who, under engagements with the state, had assumed the duty of keeping in repair portions of the Erie Canal, and who had been placed in full possession of the canal for that purpose. It was held that owners of vessels paying tolls to the state for the privilege of navigating the canal, if injured through the neglect of the contractors to keep the canal in repair, might maintain an action against them for the resulting damages. *Adsit* v. *Brady*, 4 Hill, 630; *Fulton Fire Ins. Co.* v. *Baldwin*, 37 N. Y. 648; *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Conroy* v. *Gale*, 5 Lans. 344 (affirmed 47 N. Y. 665); *Stack* v. *Bangs*, 6 Lans. 262; *Johnson* v. *Belden*, 2 Lans. 433 (affirmed 47 N. Y. 130).

If the doctrine of these cases be sound, they are sufficiently in point to warrant us in holding that the petition in this case states a good cause of action; for this petition

Digitized by Google

presents nothing more than an action against the defendant, in its character of a contractor for the repairing of public lamps, for an injury sustained by the plaintiff through a negligent non-performance of that duty.

The English cases present the same conflict of judicial opinion on the precise question we are considering. On the one hand, we have the decision of the Court of Exchequer Chamber in *Young* v. *Davis* (2 Hurl. & Colt. 197, affirming *s. c.* 7 Hurl. & N. 760), to the effect that a surveyor of highways, appointed under the statute William IV., ch. 50, is not liable for damages resulting from an accident to a traveller, caused by the neglect of such surveyor to keep the highway in suitable repair. The grounds on which that decision was placed were not so much the strict and logical rule of law that the surveyor owed no duty except to the public in its aggregate character, as a view that it would be impolitic and dangerous to allow such actions to be maintained. This view was well expressed by Chief Baron Pollock in the course of his opinion in the court of exchequer chamber: "If the plaintiff should succeed, we should enlarge the sphere of litigation, and render it difficult to find persons willing to discharge the duties of surveyors of highways; for the practical result would be that a surveyor of highways would become a sort of an insurer of every person who travelled along the road, and not a single accident would happen without an action being brought against him. In my opinion, the judges ought to consider the consequences of their decisions as regards a multiplicity of actions, and not to open an endless flood of litigation." The reason of the rule as thus stated did not apply in the case where the reparation of highways, docks, or other public works was committed to incorporated boards of trustees who had the power of raising funds for the purpose, either by the levying of taxes or of tolls. This was settled in the leading case of the *Mersey Docks Trustees* v. *Gibbs* (L. R. 1 H. L. 93, affirming the

Digitized by Google

decision of the Exchequer Chamber, 5 H. & L. 719, reversing that of the Court of Exchequer, 3 Hurl. & N. 164,,and 1 Hurl. & N. 139). It was there held that incorporated trustees of a public harbor, having, under the statute which defined their duties, power to keep a certain harbor in repair and to receive tolls for the use of the same from the owners of the vessels which might enter the same, were liable to the owner of a vessel which had entered the same, for damages happening to his vessel in consequence of their negligence in failing to keep the harbor in suitable repair. A reading of that case will show that the decision was placed upon the precise ground upon which private corporations operating canals, turnpikes, or other public works, and receiving tolls from individuals for the use of the same, are liable to such individuals for damages happening to the latter through the failure of the former to keep them in suitable repair. The principle was that the payment of tolls gave the party injured the right to demand of such incorporated trustees reasonable diligence, to the end that he should get what he paid for, the privilege of using a reasonably safe harbor. This will appear from the following language of Mr. Justice Blackburn, in delivering the opinion of the judges in answer to the questions propounded by the Lords: "It is obvious that a ship-owner who pays dock-rates for the use of the docks, or the owner of goods who pays warehouse-rates for the use of a warehouse and the service of warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and service, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid." It is thus seen that the liability of these *quasi* public officers to individuals is placed upon precisely the same footing as that of public warehousemen, public carriers, proprietors of

Digitized by Google

public canals, bridges or turnpikes, and all other private persons or corporations who, for pecuniary gain or other private advantage, take upon themselves the performance of public duties, for the benefit of individual members of the public who may solicit the performance thereof and pay them a reward therefor. The fact of the payment of the reward, or of the legal obligation to pay the same, for the particular service solicited and rendered, raises a duty on the part of the person or corporation rendering the service, in favor of the person soliciting it, to use reasonable care in its performance. They are drawn into a relation analogous to that of privity of contract, and in some cases, as in that of a non-performance of duty by a public carrier, the injured person may bring his action either upon the contract or upon the duty raised by the law. The leading English case, where this right of action is held to exist, was the case of *Parnaby* v. *Canal Co.* (11 Ad. & El. 223). The American cases are so numerous where the incorporated proprietors of turnpikes, plank roads, bridges, ferries, railways, telegraphs, canals, wharves, and gas-works, have been held liable for such non-feasance, that it would be an useless labor to cite them. But this great mass of decisions is not relevant to the point here under consideration, because this plaintiff, at the time of receiving the injury of which he complains, had not been drawn into any sort of privity with the defendant, or acquired the right to demand diligence on the part of the defendant in the performance of any duty to him, by the payment of tolls to the defendant, for the use of any public works owned or operated by it, or for the performance of any duty which the defendant had engaged to perform on behalf of the members of the public who should apply therefor.

The law does, however, give a right of action in one class of cases upon a principle which, if extended, would uphold the plaintiff's right of action in this case, and

Digitized by Google

that is the right of action which a traveller has against a municipal corporation who is injured by the negligent failure of such corporation to keep its streets in repair. This right of action, it is true, is denied in some of the states, but in most of them, as in this state, it is allowed to exist; and an examination of the early decisions, where its existence was controverted, will show that the doctrine takes root in the case of *Henly* v. *Mayor* (reported 5 Bing. 91; 3 Moo. & P. 278; in error to King's Bench, 3 Barn. & Adol. 77; in the House of Lords, 2 Cl. & Fin. 331; 1 Bing. N. C. 222; 8 Bli. (N. R.) 690; 1 Scott, 29). In that case, the corporation of Lyme Regis had accepted a grant of franchises from the crown, on the condition, among other things, of keeping a certain sea wall in repair. They did not discharge this duty, and the sea burst in and overflowed the lands of a private person. It was held in the House of Lords that he was entitled to maintain an action for the damages against the municipal corporation. Now, the principle of that case was not different from the principle which the plaintiff invokes in this case. By accepting the grant from the crown on the condition named, the municipal corporation had engaged with the crown to discharge a certain duty *for the benefit and protection of the individual inhabitants of the town*, and it was held that one of such inhabitants, injured by the failure of the corporation to discharge this duty, that is, in effect, to perform the contract with the crown, might maintain an action against the corporation for the damages which he had thereby suffered. In that case, the Mayor and Burgesses of Lyme Regis were sued by an individual for the non-performance of their duty, as public contractors for the reparation of a sea wall. In this case the Laclede Gas-Light Company is sued by the plaintiff for the non-performance of its duty as a public contractor for the reparation of public lamps. The principle which upheld the action in that case will uphold it in this; and it is precisely the principle which

Digitized by Google

would have upheld the plaintiff's action (assuming that he had a right of action) if, instead of suing this defendant, he had sued the city of St. Louis for the same injury. That principle is that, by accepting its charter from the state, which committed to it the property and control of public highways within its boundaries, the city of St. Louis impliedly engaged with the state to exercise reasonable diligence in keeping those highways in repair for the benefit of the citizens of the state, and of all other persons who might lawfully use the same.

It is thus seen that there are lines of decisions which proceed upon principles which deny the plaintiff's right of action as stated in his petition, and other lines of decisions which proceed upon principles which uphold it. In the absence of controlling authority upon the precise question, we are at liberty to adopt either, according to our views of the principle which is best calculated to subserve the ends of justice and to promote the public interest. Our opinion is that the contract declared upon, as recited in the petition, raises, on the part of the defendant, a public duty to be performed for the benefit of the inhabitants of St. Louis distributively, and that, for the negligent non-performance of this duty, an action will lie, either by the city of St. Louis suing upon the contract, or by any individual specially damaged thereby, proceeding as for the non-performance of a public duty, and setting up the contract by way of inducement. It follows that we are of opinion that the plaintiff's petition sets forth a substantial cause of action.

2. But upon the merits of the case, we are constrained to say that this cause of action has not been established by the evidence. It appears that a lamp-post, which the defendant was under a duty by its contract with the city to keep in repair, had been knocked down by a runaway team at four o'clock in the afternoon, and had fallen diagonally across the sidewalk. A policeman who saw it knocked

Digitized by Google

down swung the end of it around so that it lay on the outer edge of the sidewalk along the curbstone, and then immediately reported the fact at the police station. The distance from the lamp post to the defendant's office was five squares. There was no evidence that the fact was reported at the defendant's office until the following day; but another policeman testifies that, about seven o'clock of that evening, he saw a man named Devine, together with another man whom he did not know, at the scene of the accident with a shovel and pick working at the lamp post. The officer had known Devine for a number of years; he generally saw him working around the gas lamps within the district in which the defendant, under its contract with the city, had undertaken to keep the lamps in repair. The officer did not know whether these men were in the employ of the defendant or not, except from the circumstance that he had seen Devine working about the lamps.

It was in evidence that, under the contract between the defendant and the city, the defendant was bound to commence lighting the lamps within its district at 6:30 in the evening, and to complete the lighting of them by 7:15. The plaintiff walking along the sidewalk at about 7:30 p. m., fell over this prostrate lamp post and sustained the injury complained of.

Upon this evidence the court put the case to the jury upon the following instruction: "The court instructs the jury that it was the duty of the Laclede Gas-Light Company to keep and maintain the lamp post mentioned in the petition in good condition; and if they believe from the evidence that said defendant, its agents or servants, had notice that said post was broken down, and defendant failed to have the same removed, guarded, or lighted so as to ward off danger, and it had reasonable time to do so after said notice and before the injury, the said defendant was guilty of negligence; and if they believe that plaintiff, in walking along said street, in the usual place or places for pedestri-

Digitized by Google

ans, fell over said post, and without fault on his part, was thereby injured, they will find for the plaintiff." It will be perceived that this instruction left it to the jury to say (1) whether the defendant had notice, and (2) whether its agents or servants had notice of the accident in time to have the fallen post removed, guarded, or lighted, so as to ward off danger. It may be observed, in the first place, that this instruction is erroneous in point of law, because there are many cases where notice to the agents and servants of a corporation will not be notice to the corporation itself, so as to charge it with liability. In order that notice to the servant or agent of a corporation shall affect the corporation itself with notice, the notice must relate to something within the scope or employment of such agent or servant. Now, in the first place, there is no evidence at all that either of the men whom the policeman saw with the shovel and pick at seven o'clock in the evening in question were in the employ of the defendant, much less that they were its agents or servants under such an employment or agency that notice to them would be notice to the company. The fact that they, on this occasion, undertook to do something to the fallen lamp post does not tend to show that they were in the employ of the defendant at the time, because any laborer passing along the street with a shovel and pick might, out of a desire to promote the public safety, stop and endeavor to remove such an obstruction from the sidewalk. Nor does the fact that a policeman had seen one of these men on former occasions working about the street lamps within the defendant's district, at all tend to show that he was in the employ of the defendant, either when thus seen working about the street lamps, or on the evening of this accident. He might have been, on those occasions, an employe of a sub-contractor under the defendant, and not under the defendant's orders, or in any relation of privity with the defendant; and the testimony given at the former trial indicates that this was the fact. We do not

Digitized by Google

refer to this former testimony with the idea that it can be made in any sense the basis of our decision in this case, but we refer to the fact as there disclosed, merely for the purpose of showing the impropriety of a rule of evidence which would raise the presumption that this man was in the employ of the defendant, and charged with such duties as would make notice to him that a lamp post within the defendant's district had fallen down, a notice to the defendant. Again, this man might well have been in the employ of the defendant on former occasions, and yet he may have been discharged from its employ on the occasion in question. On this occasion the policeman saw him at the fallen lamp post but a moment, did not really wait to see what he was doing, but passed a word or two with him, and went on. Then, we know of no principle of law, and no fact is proved, touching the employment of lamp-lighters by this defendant, which would make the knowledge of such persons that a lamp post had fallen down the knowledge of the defendant. The persons employed to light these lamps may not have been the servants of the defendant at all. They may have been servants of an independent contractor under the defendant; but if they were the servants of the defendant in such a sense that they were bound to inform the defendant that a lamp post had fallen upon the sidewalk, and to take measures to remove, guard, or light the same, so that it would not be dangerous to travellers, they were not, as we held when the case was here before, bound to suspend the lighting of their lamps in order to attend to this duty. They were allowed, by the defendant's contract with the city, and the schedule of time for the lighting of the lamps which had been prescribed by the city thereunder, until 7:15 p. m. for the lighting of the lamps on that night. There is no evidence that any of them completed the task before that hour. Assuming that the task was completed at that hour, and that their employment was such that they were under the duty of at once giving atten-

Digitized by Google

tion to this fallen lamp post, there remained an interval of but fifteen minutes between that time and the time of the accident in which to attend to this duty. It ought not to have been left to the jury to say that this was a reasonable time. The court ought, as requested by the defendant, to have instructed the jury as matter of law, that it was not a reasonable time. The defendant offered instructions which, though argumentative, ended by peremptory directions to the jury to find for the defendant. As there was no evidence of negligence to take the case to the jury, it was error to refuse these instructions. It is no objection to a peremptory instruction, where such an instruction is proper, that it is argumentative; since the argumentative part is necessarily addressed to the court only.

We, therefore, reverse the judgment and remand the cause. All the judges concur.

FRANK DAVIS, Respondent, v. ABRAHAM SCHIELDS, Appellant.

November 20, 1883.

NOTICE — PRACTICE — APPEAL FROM JUDGMENT OF A JUSTICE. — On appeal from a justice's judgment, it is error to dismiss the suit for want of notice of appeal before the second term at which the cause is triable.

APPEAL from the St. Louis Circuit Court, BARCLAY, J.

Reversed and remanded.

C. C. SIMMONS, for the appellant.

WIELANDY & PEABODY, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This case was tried before a justice of the peace, who gave judgment for the plaintiff on the 22d of January, 1883.

On the 31st of January, 1883, an appeal to the circuit court was granted. At the April term, 1883, namely, on the 5th of April, the circuit court, on the motion of the plaintiff, affirmed the judgment of the justice, for the reason that the defendant had not given notice of the appeal within the time prescribed by the statute. The propriety of this ruling is the only question we have to consider.

It will be perceived that this judgment of affirmance was rendered at the second return term of the circuit court after the appeal from the justice had been granted. Rev. Stats., p. 1505, sect. 9. It will also be perceived from the same section of the statute, that the first term of the circuit court after the appeal was granted, commenced on the first Monday in February, which was less than ten days from the date when the appeal was granted, and accordingly the cause was not triable at the February term. Rev. Stats., sect. 3054; *Knapp* v. *Skeele*, 31 Mo. 434. The case was not, therefore, triable until the April term. It is also to be noticed that the appeal was not allowed by the justice on the day on which the judgment was rendered.

Keeping these facts in view, the question is to be determined by construing together the following sections of the Revised Statutes: "If the appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing, stating the fact that an appeal has been taken from the judgment therein specified." * * * Rev. Stats., sect. 3055. "If the appellant fail to give notice of his appeal, when such notice is required, the cause shall, at the option of the appellee, be tried at the first term, if he shall enter his appearance on or before the second day thereof, or at his instance, shall be continued, as a matter of course, until the succeeding term, at the cost of the appellant, but no appeal shall be dismissed for want of such notice." *Ibid.*, sect. 3056. "If the appellant shall fail to give such notice, at least ten days

Digitized by Google

before the second term of the appellate court, after the appeal is taken, the judgment shall be affirmed or the appeal dismissed, at the option of the appellee." *Ibid.*, sect. 3057. There is a seeming incongruity between sections 3055 and 3057. The former section requires notice of the appeal to be given "at least ten days before the first day of the term at which the cause is to be determined." The latter gives the appellee the right to demand the dismissal of the appeal or an affirmance of the judgment unless notice is given "at least ten days before the second term of the appellate court after the appeal is taken." There is also a direct conflict between the literal meaning of sections 3056 and 3057. The former prescribes, without any qualification whatever, that no appeal shall be dismissed for want of notice of the appeal. Sections 3055 and 3056 appear in the present revision as they stood in the General Statutes. Section 3057 was added by the present revisers. When they added it, they had section 3056 under their eye, and must have seen, if they gave any attention to it, that the two would contradict each other. And the question is, what did they mean by letting them stand as they did?

The question, we think, can be solved, if we give attention to the mischief of the law as it stood before the revisers thus amended it, and the remedy which they must have had in view, and then construe the amendment so as to suppress the mischief and advance the remedy. The mischief of the old statute was that the appellant in case of appeals from justices of the peace, was required to give notice of his appeal within the prescribed time, and no penalty was affixed to the requirement. An appeal might be taken from a justice on the day after the rendition of the justice's judgment, and the cause might remain indefinitely in the circuit court without the appellee having any knowledge of its removal. The revisers evidently intended to remedy this by fixing a date after which, in case the appel-

Digitized by Google

lant fail to give notice of the appeal, the appellee might, on discovering the fact, have the appeal dismissed or the judgment affirmed. This manifest intention of the revisers is reached, and the three sections are harmonized, by reading section 3057 as though it were a proviso to section 3056; and so read, the substance of the three sections would be (1) that notice of the appeal is to be given in the case named, at least ten days before the first day of the term at which the case is triable in the circuit court, which, in this case, was the April term; (2) that the appeal is not to be dismissed for want of such notice, unless (3) the notice is not given at least ten days before the second term of the appellate court, *at which the case is triable*, after the appeal is taken, which, in this case, would be the June term. This is the only ground upon which the three sections can be harmonized at all, and it is the ground which reaches the probable intention of the revisers. They could not have meant a thing so absurd as to prescribe that a certain notice should be given, and then in the next section to prescribe that the appeal should not be dismissed for want of such notice, and then in the next section after that to enact that the appeal should be dismissed for want of such notice, given at an earlier day. The idea evidently was that the appellee should have notice ten days before the first day of the term at which the cause could be tried, in order that he might prepare for the trial, and that if he should not have such notice, another trial term need not pass without a dismissal. The notice referred to in section 3056 is unquestionably the notice prescribed in section 3055; and when section 3057 uses the phrase "such notice," it manifestly refers to the same notice; and it is not to be so construed as to have the effect of shortening the time prescribed in section 3055 for the giving of notice.

If we are right in this conclusion, the justice's judgment in the present case could not properly have been affirmed

Digitized by Google

for want of notice of the appeal until the June term of the circuit court. For the error of affirming it at the April term, the judgment of the circuit court is reversed and the cause remanded.

All the judges concur.

---

14 401
40 67

14 401
59 466

14 401
172

CHARLES C. GARRETT, Respondent, *v.* HENRY CRAMER, Appellant.

November 20, 1883.

1. **ACTION FOR COSTS.**—A witness in whose favor fees are taxed in a cause may maintain an action therefor against a surety for costs whose liability has become fixed by the judgment.
2. —— **PARTIES TO — PRACTICE.** — The objection that the other witnesses in the cause were not joined as parties plaintiff can not be raised for the first time on appeal.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

JOHNSON, LODGE & JOHNSON, for the appellant.

J. K. HAUSBROUGH, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace upon a statutory undertaking, whereby the defendant engaged, in a suit pending in the circuit court of the then County of St. Louis, between John H. Graf, by next friend, plaintiff, and C. Borgdorf, defendant, to pay all costs which had accrued or which might accrue in the suit. The undertaking was entered into in conformity with a rule upon the plaintiff to give such security, on motion of the defendant. It was in the following language:—

"I acknowledge myself bound for all costs that have accrued or may accrue in the case of John H. Graf, by next

Digitized by Google

friend, against C. Borgdorf and all. Witness my hand at seal at St. Louis this day of 3d February, 1874.

"(Signed) HENRY CRAMER [L. S.].

"Approved by the court February 3d, 1874.

" J. LEWIS, *Clerk*."

It appeared at the trial that the plaintiff was one of thirteen witnesses who had been examined for the plaintiff in that suit and whose fees, taxed at various sums from $30.55, the amount of this plaintiff's fees, to $5.80, the amount of those of the witness, John P. Graf. In the suit in which this undertaking was given the judgment was rendered in favor of the plaintiff and against one of the defendants. Evidence was also introduced tending to show that the parties to the suit in which this undertaking was given were all of them insolvent and had no property within the city or county of St. Louis subject to execution. We do not see that any evidence was offered tending to show whether the other twelve witnesses in favor of whom witness fees were taxed in the case of *Graf* v. *Borgdorf* have been paid their fees or not.

Upon this evidence the question which arises is whether the plaintiff is entitled to maintain this action. The defendant takes the ground that he is not, for two reasons: (1.) That he is not the obligee in the bond sued on. (2.) That, if he is the obligee in the bond, then the other witnesses in whose favor fees were taxed were co-obligees and should have been joined as parties plaintiff.

1. It will be perceived that no obligee is named in this undertaking and the instrument is certainly anomalous, as was pointed out by the supreme court with reference to a similar instrument in *Davis* v. *Farmer* (28 Mo. 55). If the defendants had been the successful parties in the suit in which this undertaking was given judgment might, it seems, have been rendered against the surety for costs, as well as against the plaintiff (*Hamiltons* v. *Moody*, 21 Mo. 79), or if the judgment had not been rendered against the surety the defendants in the action might have sued upon

Digitized by Google

the instrument, as was held in *Davis* v. *Farmer* (28 Mo. 55), where the court said: "The apparent intention of the legislature would be defeated by applying technical rules to such instruments, and hence to give them effect it is necessary to construe the defendant in the suit in which the obligation is filed as the obligee and to allow him, in the event that the plaintiff is condemned to pay the costs, to maintain an action in his own name for all the costs which the plaintiff is bound to secure." But it is not necessarily to be inferred from this language that where the plaintiff prevails in the suit he is to be deemed the obligee and is to bring an action against his own surety for costs which he himself has occasioned, but which neither he nor defendants are able to pay.

This undertaking appears to have been given under section 986 of the Revised Statutes (Gen. Stats., p. 687, sect. 2) which reads as follows: "If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant, or any officer of the court, rule the plaintiff, on or before the day in such rule named to give security for the payment of the costs in such suit. And if such plaintiff shall fail on or before the day in such rule named to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued, or may accrue, in such action, the court may on motion dismiss the suit unless such undertaking shall be filed before the motion is determined."

The primary object of this statute, no doubt, was to afford the means of securing the officers of the court in respect of their fees, and though witnesses are not named therein, manifestly it ought to be liberally construed so as to embrace them also. It is a well understood rule with

Digitized by Google

reference to penal bonds or undertakings given for the security of third persons, that any person injured by a breach of such a bond or undertaking may maintain an action thereon. Before our practice act such a person would have brought his action in the name of the obligee in the bond to his own use, as was done in the case of *United States to use* v. *Ferguson* (16 Mo. 258), where a garnishee maintained an action on an attachment bond which had been given in the United States circuit court in the name of the United States, the obligee therein. But under our present practice act, even if an obligee had been named in the undertaking here sued on, which is not the case, the plaintiff could not have maintained suit in the name of such obligee, but would have been required to sue in his own name, just as he did. We think, therefore, that the undertaking sued on was intended for the security of the officers of the court and witnesses in whose favor costs might be taxed, and that such persons, being the real beneficiaries in the undertaking, may maintain an action in their own names for the breach of it.

2. The second objection that, if the plaintiff is entitled to maintain an action upon this instrument, he is to be deemed a joint obligee with the other witnesses, and with the officers of the court entitled to costs, does not properly arise on this record. In the first place it does not appear from the bill of exceptions that any other costs except those due to this plaintiff remain unpaid, and it can not be presumed that such is the case for the purpose of defeating his right of action. In the second place the defendant made no objection anywhere in the proceedings that there was a non-joinder of parties. Such an objection, it is well settled, can not be taken by motion in arrest of judgment, the defendant having gone to trial on the merits without making it. *Horstkotte* v. *Menier*, 50 Mo. 158; *Mississippi Planing Mill* v. *Presbyterian Church*, 54 Mo. 520; *Rickey* v. *Tenbroeck*, 63 Mo. 563; *Fowler* v. *Williams*, 62 Mo. 403.

Digitized by Google

But even if it could, such non-joinder was not stated as a ground for arresting the judgment which was filed.

The judgment of the circuit court is affirmed. All the judges concur.

JOHN L. BEVERIDGE, Respondent, v. L. L. RICHMOND, Appellant.

November 20, 1883.

BILL OF EXCHANGE — ACCOMMODATION ACCEPTOR. — An accommodation acceptor of a draft is bound to pay the draft, though it is not presented for payment until long after its maturity and after the drawer has become insolvent.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

BROWN & YOUNG, and UPTON M. YOUNG, for the appellant.

HENRY E. MILLS, for the respondent: Knowledge that the bill was accepted for accommodation does not affect the right of the holder for value to recover from the acceptor. — Dan. Neg. Inst., sects. 790, 786, 1335, 1336, and cases cited, note 1; Story on Bills, sects. 191, 194, 253, 423; *Cromise v. Kellogg*, 20 Ill. 13. No delay in proceeding against the drawer can affect the liability of the acceptor to the holder. — *Miller v. Mellier*, 59 Mo. 388; Dan. Neg. Inst., sects. 546, 1326. Richmond was not a surety. He was principal debtor. — Dan. Neg. Inst., sects. 1334, 1335*a*; *Cromise v. Kellogg*, 20 Ill. 11; *Prout v. Lomer*, 79 Ill. 332.

THOMPSON, J., delivered the opinion of the court.

The question in this case is whether the plaintiffs are entitled to recover on the following agreed statement of facts: "A firm of Tryber & Sweetland, of Chicago, Illi-

Digitized by Google

nois, on the 15th of June, 1882, drew their certain bill of exchange, whereby they directed L. L. Richmond, twenty-five days after date, to pay to the order of themselves, meaning Tryber & Sweetland, $300, and addressed the same to the defendant, L. L. Richmond, St. Louis, Missouri; that said L. L. Richmond, in writing, accepted the same for the accommodation of said drawers, on the face, on June 16, 1882; that said bill was returned by said Richmond to said Tryber & Sweetland at Chicago, for negotiation there, and said Tryber & Sweetland, for value, indorsed said bill on the 19th day of June, 1882, to plaintiffs, who are bankers in the city of Chicago, Illinois; that plaintiffs knew that Tryber & Sweetland had obtained the acceptance from Richmond as an accommodation to them (Tryber & Sweetland); that said Richmond had previously had business dealings with Tryber & Sweetland in buying sewing machines from them, and had previously accepted drafts drawn by them and payable prior to his indebtedness to them becoming due; that plaintiffs, from the peculiar and confusing manner in which the word "twenty-five" was written, mistook the word for seventy-five, and did not present the same to Richmond for payment until the expiration of seventy-five days from date; that, at the expiration of twenty-five days from date, the drawers were solvent and carrying on business, and that their business relations with Richmond were such that, if the same had been presented to Richmond at the end of twenty-five days from date, the same would have been paid by Richmond without loss to himself; that in the interval between the twenty-five days and the seventy-five days, the firm of Tryber & Sweetland failed, owing Richmond an amount in excess of $300. The bill of exchange was not presented at its true date of maturity, and was not presented and protested until fifty days after."

Upon these facts the circuit court gave judgment for the plaintiffs, and we are clear of doubt that this judgment

Digitized by Google

ought to be affirmed. Nothing is better settled in this state than that a party to a negotiable instrument stands liable to the holder thereof in the character which he has assumed under the law merchant by putting his name to the paper, in the absence of a special contract or understanding between him and the holder that he shall be liable in some other character. *Boyer* v. *Boogher*, 11 Mo. App. 130; *Butler* v. *Gambs*, 1 Mo. App. 466; *Miller* v. *Mellier*, 59 Mo. 388. The acceptor of a bill of exchange is not a surety. As between him and the payee, his engagement is not a collateral, but an original and direct, undertaking. The payee accepts the acceptor as his debtor, and he can not resort to the drawer except upon a failure of due payment by the acceptor. *Raborg* v. *Peyton*, 2 Wheat. 385. And this relation is not changed by reason of the fact that the acceptance was for the accommodation of the drawer, and that the payee knew this before he purchased the paper.

The relation of this defendant, then, to the plaintiffs became, by his acceptance of the bill, that of an original debtor. The question which follows from this statement of the law is: Was such a thing ever heard of as that a creditor loses his remedy against his debtor by not demanding payment on the day when the debt fell due? The creditor is at liberty to delay his demand, and take the risk of his debtor becoming insolvent, or of the demand becoming barred by the statute of limitations. The debtor, on the other hand, must stand ready to pay when payment is demanded. Nor is the creditor bound to accept payment when it is tendered; nor does he lose his debt by not accepting it, though his refusal to accept it when tendered will stop the running of interest.

The judgment is affirmed. All the judges concur.

Digitized by Google

CHARLES HOYLE ET AL., Respondent, *v.* ISADOR BUSH ET AL., Appellants.

November 20, 1883.

1. **STATUTE OF FRAUDS.**—Entire performance of a contract by one of the parties to it takes the contract out of the operation of the statute of frauds.

2. —— **LESSOR AND LESSEE—DESCRIPTION.**—In an action for rent by a lessor who has executed the contract by putting the lessee in possession, that the property is not described with such accuracy as to enable a third person to identify it without the aid of oral testimony will not avail as a defence.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

JAMES & C. S. TAUSSIG, for the appellants: The lease does not contain a sufficient description to satisfy the statute of frauds.—*Scarritt* v. *Church*, 7 Mo. App. 174; *Whelan* v. *Scullen*, 102 Mass. 204; *Ives* v. *Armstrong*, 5 R. I. 567. Parol testimony was inadmissible for the purpose of locating the property.—*King* v. *Wood*, 7 Mo. 383; *Schroeder* v. *Taaffe*, 11 Mo. App. 267; *Williams* v. *Morris*, 95 U. S. 444.

JAMISON, COLLINS & JAMISON, for the respondents: "The appellants voluntarily entered into the contract, went into possession under it, peaceably occupied the premises according to its terms, and, on the plainest principles of justice, are estopped from disputing its validity."—*Grant* v. *White*, 42 Mo. 285, 290; *Gray* v. *Gaff*, 8 Mo. App. 329; *Dimmock* v. *Daly*, 9 Mo. App. 354. Parol evidence is admissible to explain a written instrument.—1 Greenl. on Ev., sects. 293, 336, and also sects. 295*a*, 340; *Edwards* v. *Smith*, 63 Mo. 119; *Philibert* v. *Burch*, 4 Mo. App. 470; *Washington Mut. Ins. Co.* v. *St. Mary's Seminary*, 52 Mo. 480; *Ferris* v. *Thaw*, 72 Mo.

Digitized by Google

446; *Franklin Ave. German Savings Inst.* v. *Board of Education, etc.*, 75 Mo. 408.

THOMPSON, J., delivered the opinion of the court.

This is an action for one month's rent upon the covenant of payment in a lease, whereby the plaintiffs demised to the defendants a term of five years in premises described in the lease as follows: "Those sub-cellars and basement above, under the building on southeast corner of Fourth and Elm Streets, known as Nos. 200 and 202 South Fourth Street, reserving from said basement a portion of the west end, and being the same premises now occupied by Isador Bush & Co." The defence is that the description of the premises demised is so vague and uncertain as not to satisfy the statute of frauds. The plaintiffs at the trial put the lease in evidence against the objection of the defendants, and gave evidence against the like objection tending to show that the defendants were in possession under the lease of the "sub-cellar and basement above at 200 and 202 South Fourth Street, in the city of St. Louis, State of Missouri, where they have been for twelve years;" that they were thus in possession when the lease was made, and that the building is at the southeast corner of Fourth and Elm Streets.

We think there was no error in admitting this evidence. The statute of frauds has no application to this case. The evidence sufficiently shows that the defendants were in possession under the lease; and it is well settled in this state that entire performance of a contract, by one of the contracting parties, takes it out of the statute of frauds. *Self* v. *Cordell*, 45 Mo. 345. Accordingly, when there had been a sale by parol of a mining claim, and the vendee had taken possession, he could not resist payment of the purchase-money on the ground that the contract was within the statute of frauds. *Tatum* v. *Brooker*, 51 Mo. 148. So, here, the defendants having taken possession

Digitized by Google

under the lease, the contract has been wholly executed by the plaintiffs on their part, and the defendants can not remain in possession and enjoy the fruits of the lease on the ground that the premises were not described in the lease with such accuracy that a third person could identify them without the aid of parol evidence.

We are asked, in affirming the judgment, to give damages. It is suggested by counsel for the defendants that several other actions growing out of the covenants in this lease are pending in the circuit court, and that the defendants, without having made any defence on the merits in this cause, have brought it here for the purpose of having their rights under the lease determined. In view of these suggestions, we shall not give damages; but the judgment of the circuit court will be affirmed. All the judges concur.

STATE OF MISSOURI, Respondent, *v.* FRANK MCNEARY, Appellant.

November 20, 1883.

CRIMINAL LAW—DRAM-SHOPS—EVIDENCE.—In prosecutions for the sale of liquors in quantities less than a gallon without a license therefor, the burden is on the defendant to show a license, and this applies as well to a bar-keeper as to a proprietor.

APPEAL from the St. Louis Court of Criminal Correction, NAPTON, Provisional J.

Affirmed.

L. D. SEWARD and C. C. SIMMONS, for the appellant.

E. C. ELIOT, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was an information for violation of the statute prohibiting the sale of intoxicating liquors in quantities less

Digitized by Google

than a gallon. The offence is charged as being committed at a saloon in the city of St. Louis. The defendant was convicted.

Defendant moved to quash the indictment, on the ground that, by a certain municipal ordinance, the municipal assembly, mayor, and comptroller of St. Louis have renounced and refused to exercise the power of issuing dram-shop licenses; and because there is in the city of St. Louis no officer or court authorized to grant a license to keep a dram-shop. The motion was overruled.

The state introduced a witness who testified that, on the day and place named in the information, he purchased of defendant a glass of whiskey, less than a gallon, in a room fitted up as a bar-room; and paid for it and drank it on the premises. On cross-examination, the witness stated that defendant was a bar-keeper, and that the witness did not know who was proprietor of the saloon.

The city collector, against defendant's objection, testified that no one had, at the time named in the information, a license to keep a dram-shop at the place in question.

The court instructed the jury that if they believe that defendant sold, etc., they should find him guilty, etc., "provided neither defendant nor any person for whom he acted in the capacity of agent or clerk, had a license to sell whiskey at such place, then continuing in force." The court further instructed that: "It is the duty of defendant to show his license, or the license of his employer, if acting under one, if he has one; and, if he does not do so, the law presumes that he has none, and any sale of fermented or distilled liquors by him, in quantities less than one gallon is illegal."

We see no error in the instructions. The general rule is laid down by Greenleaf (Greenl. Ev., sect. 79), that, in civil and criminal prosecutions, for a penalty for doing an act which the statutes do not permit to be done except by persons duly licensed therefor as for selling liquors and the

Digitized by Google

like, the negative averment is taken as true, unless disproved by the party accused. This is undoubtedly the rule in many of the American states, though it is not accepted in all of them. It is, however, the rule in Missouri. *The State* v. *Lipscomb*, 52 Mo. 32; *The State* v. *Taylor*, 73 Mo. 52.

Counsel for appellant admit that this is the rule when the question is as to the proprietor of a dram-shop, but say that it ought not to be the rule when the person charged with the offence is a servant of the proprietor. We see no sufficient reason for any such distinction. The legislature regards the selling of liquor at retail as a business having a tendency to deprave public morals, and which it is expedient to restrict. It is not prohibited by law, but it is made by law a privilege, to be exercised only by those having the qualifications, and having pursued the steps required by the state law, as is remarked by Judge Napton in *Austin* v. *The State* (10 Mo. 593). Since, then, by law, only one man, here or there, is licensed to sell, the presumption would be that the sale by this or that individual is unauthorized, until the contrary be shown. *Bliss* v. *Brainard*, 41 N. H. 262. It is for the person who sells drams as the servant of another, to satisfy himself that his master is licensed to sell drams. In dram selling he commits, *prima facie*, an illegal act in Missouri; and, if his act is legal, because of a license, it is for him to show the license. It was, therefore, unnecessary for the state to show that no one had a license to sell drams at the place named in the information.

As to the claim on the part of the appellant that there is not, and was not at the time of the offence committed, any one authorized to issue a license for dram selling in St. Louis, we need say no more about it than that it is perfectly immaterial in this case. That no one could legally give defendant a license to sell liquor in St. Louis would, if shown affirmatively, prove, what we hold might be pre-

Digitized by Google

sumed in the absence of proof to the contrary, that he had no license, and that he was not selling as servant of any one having a license. As no person is permitted to sell intoxicating liquor, in any quantity less than a gallon, without a license, and as the proof is undisputed that defendant did sell less than a gallon of whiskey, the offence, in that case, is made out.

We see no reason why the conviction should be disturbed. It is, therefore, affirmed. All the judges concur.

STATE OF MISSOURI EX REL. CIRCUIT ATTORNEY, Appellant, v. WALBURGA UHRIG ET AL., Respondents.

14a 413
33a 109
14 413
109m 518
50 468

December 4, 1883.

EQUITY — INJUNCTION — NUISANCE — DRAM-SHOPS. — Equity will not restrain the keeping of an unlicensed dram-shop, though the keeping of it is a public nuisance.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

E. C. ELIOT and J. G. LODGE, for the appellant.

KEHR & TITTMANN, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This proceeding is in the nature of an information in equity, by the circuit attorney of the city of St. Louis, to procure an injunction against the keeping of an unlicensed dram-shop, on the ground that it is a public nuisance. A demurrer to the petition was sustained by the circuit court. The only question which we shall consider is, whether such relief can be had upon any state of facts and against proper parties.

I. We do not question the proposition that the keeping of an unlicensed dram-shop is a public nuisance. That has

Digitized by Google

been repeatedly held, in conformity with the general rule of law that the repeated and habitual doing of an unlawful act becomes a nuisance by reason of the repetition of the act and the continuity of the practice. Roscoe Crim. Ev. (7th ed.), 799; *The Commonwealth* v. *Smith*, 6 B. Mon. 23; *Wilson* v. *The Commonwealth*, 12 B. Mon. 2; *Meyer* v. *The State*, 42 N. J. L. 145; *The State* v. *Williams*, 30 N. J. L. 102, 110; *The State* v. *Crawford*, 28 Kan. 726.

II. But courts of equity have never exercised a general jurisdiction to enjoin public nuisances upon information brought and prosecuted on behalf of the public. On the contrary, this jurisdiction has been exercised within such narrow limits that it must be regarded as a very special and exceptional jurisdiction.

So far as I can ascertain after an extensive search, it has never been exercised, either in England or in this country, except in the three following classes of cases: —

1. To restrain purprestures of public highways or navigations. *Attorney-General* v. *Forbes*, 2 Mylne & Cr. 123; *Attorney-General* v. *Johnson*, 2 Wils. Ch. 87; *Attorney-General* v. *Sheffield Gas Co.*, 3 De Gex, M. & G. 304; *District-Attorney* v. *Railroad Co.*, 16 Gray, 242; *Attorney-General* v. *Cambridge*, 16 Gray, 247.

2. To restrain threatened nuisances dangerous to the health of a whole community. *Attorney-General* v. *Blount*, 4 Hawks, 384; *Attorney-General* v. *Hunter*, 1 Dev. Eq. 12.

3. To restrain *ultra vires* acts of corporations injurious to public right. *Attorney-General* v. *Railroad Co.*, 1 Drew. & Sm. 154; *Attorney-General* v. *Railroad Co.*, L. R. 3 Ch. 100; *Attorney-General* v. *Railroad Co.*, 4 De Gex & Sm. 75; *Attorney-General* v. *Mayor*, 1 Mylne & Cr. 171; *Attorney-General* v. *Corporation of Litchfield*, 13 Sim. 546; *Attorney-General* v *Mayor*, 2 Mylne & Cr. 406; *Attorney-General* v. *Railroad Cos.*, 35 Wis. 425. An examination of the cases under this last head will show that the jurisdiction in this regard is exercised sometimes on the

Digitized by Google

ground of nuisance, and sometimes on the ground of trust, and in particular cases, perhaps, on both grounds.

III. Unquestionably, the exercise of equity jurisdiction in these three classes of cases, is an exception to a very general, well understood, and important rule. That rule is, that a court of equity has no jurisdiction in matters of crime. In these three classes of cases, jurisdiction is, however, exercised for special reasons, although unquestionably, the nuisance complained of is a misdemeanor, and subject to prosecution by indictment. The general rule, with these isolated exceptions, has been constantly asserted and applied in a variety of cases. *Holderstaffe* v. *Saunders*, 6 Mod. 16; *Montague* v. *Dudman*, 2 Ves. Sr. 296; *Gee* v. *Pritchard*, 2 Swanst. 402, 413; *Brandreth* v. *Lance*, 8 Paige, 24; *Montgomery, etc., R. Co.* v. *Walton*, 14 Ala. 207; *Portis* v. *Fall*, 34 Ark. 375; *Gault* v. *Wallace*, 53 Ga. 675; *Phillips* v. *Mayor*, 61 Ga. 386; *Kerr* v. *Corporation of Preston*, 6 Ch. Div. 463. Perhaps the most striking illustration of this rule is that a court of equity will not enjoin the publication of a libel at the suit of the person against whom the injury is threatened, merely because it is a libel, for this is a misdemeanor; and this without reference to the grievous injury to private reputation which the publication may inflict; though it constantly exercises jurisdiction to enjoin the publication of books, manuscripts and letters, on the ground of injury to proprietary rights therein. *Life Association* v. *Boogher*, 3 Mo. App. 173; *Lawrence* v. *Smith*, Jacob, 471; *Prudential Ins. Co.* v. *Knott*, L. R. 10 Ch. 142; *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Singer Manufacturing Co.* v. *Machine Co.*, 49 Ga. 70; *Morris* v. *Kelly*, 1 Jac. & Walk. 431; *Wetmore* v. *Scovell*, 3 Edw. Ch. 515; *Fleming* v. *Newton*, 1 H. L. Cas. 363, 376; *Seeley* v. *Fisher*, 2 Swanst. 581; *Brandreth* v. *Lance*, 8 Paige, 24. The doctrine that the king could take his choice in which one of his courts he would bring his action I find asserted in a single case only, and

Digitized by Google

that was a case in the Irish court of chancery. *Attorney-General* v. *Mayor*, Molloy, 95. This doctrine never was the law of England. If it had been it would, during the reigns of such kings as the Jameses and the Charleses, have turned all criminal prosecutions into chancery.

IV. "It is thus seen that this action proceeds upon the idea that we are at liberty to enlarge the jurisdiction of equity, by extending it to the restraint of a criminal matter, to which it has never hitherto attached. The English court of chancery, which has steadily refused to do this, has not proceeded under the restraints of a written constitution; but if we undertake to do it, we do it in the very face of some of the most important provisions of our bill of rights. That instrument declares that "in criminal prosecutions, the accused shall have the right to * * * trial by an impartial jury of the country." Const. Mo., Art. II., sect. 22. But here we are asked to lay down a rule which obliges him to submit to a trial before a single judge sitting as a chancellor. The same instrument also provides that "no person shall for felony be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; in all other cases, offenses shall be prosecuted criminally, by indictment or information, as concurrent remedies." *Ibid.*, sect. 12.

The information here spoken of unquestionably means, not an information in equity, but an information exhibited in a court of criminal jurisdiction, in which proceeding the accused has the right to a trial by jury. But we are asked to substitute for this information, an information in a court of equity, in which the whole matter, both of law and fact, is passed upon by a single judge. But there is, in the same instrument, another provision which makes it still more clear that this jurisdiction can not be extended: "The right of trial by jury, *as heretofore enjoyed*, shall remain inviolate." *Ibid.*, sect. 28. We have already sufficiently

Digitized by Google

indicated that the right of trial by jury has always been enjoyed in England and America in prosecutions for public nuisances, except in three classes of cases, of which the present case is not one.

V. Nor is there force in the argument that this is not a proceeding to punish a single act of unlicensed dram-selling, but to restrain a succession of acts, which, by reason of their frequency and continuity have become a public nuisance. The fact remains that the succession and continuity of the unlawful acts complained of can only be proved by proving isolated acts. What then would be the result of this proceeding, if an injunction were granted and disobeyed? An attachment would issue for a contempt, and then a single judge, sitting as chancellor, would hear evidence and try the facts whether the defendants had committed such isolated criminal acts — facts which, with the exceptions already stated, the law has always required to be contested before a jury.

We have had no doubt upon this question from the moment it was mentioned to us at the bar, and we declined to hear the counsel for the respondents upon it. But we have written this much, because we have felt that, having reference to the character of the plaintiff's counsel, to the zeal with which their view of the case has been pressed upon us, and possibly to a public interest centering in its decision, it was a question which ought not to be dismissed with a mere dash of the pen. We have been the more inclined to look into it from the fact that a very respectable court in a neighboring state has taken precisely the view of it which the plaintiff's counsel here urges, though the circumstances of the particular case were held not to call for an injunction. *State* v. *Crawford*, 28 Kan. 726.

The judgment of the circuit court is affirmed. All the judges concur.

Digitized by Google

14	418
42	457
14	418
48	210
14	418
53	458
14	418
68	209

FRED. H. MILLER, Respondent, *v.* CLARA J. MILLER, Appellant.

December 4, 1883.

1. DIVORCE — WITNESSES. — In an action for divorce the parties are not competent witnesses as to words spoken by one to the other while they were alone.
2. —— PRACTICE. — The admission of incompetent testimony which is merely cumulative and which can not prejudice the appellant, is not cause for the reversal of a decree of divorce.
3. —— EVIDENCE. — That a witness is permitted to testify as to the plaintiff's character in respect of that wherein it was not attacked, may not furnish ground for a reversal.
4. —— PLEADING AND PROOF. — A defendant in a divorce proceeding can not prove indignities offered by the plaintiff unless they are pleaded.
5. PRACTICE — NEW TRIAL. — It is not an abuse of discretion to refuse a new trial asked because counsel refused to examine witnesses in attendance and whose testimony the client requested him to take.
6. —— DIVORCE. — Appellate courts will, in divorce proceedings, weigh the evidence taken at the trial, but will not reverse unless the decree is manifestly for the wrong party or clearly against the weight of the evidence.

APPEAL from the St. Louis Circuit Court, BOYLE, J

Affirmed.

A. J. P. GARESCHÉ, for the appellant.

R. HIRZEL, J. M. & C. H. KRUM and F. J. DONOVAN, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

This is a suit for divorce, upon the ground that the defendant has offered such indignities to the plaintiff as rendered his condition intolerable. The circuit court decreed for the plaintiff.

When the cause was called for trial, the defendant objected to any hearing thereof, because the plaintiff was in arrear to the amount of $15 on an order for alimony *pendente*

Digitized by Google

lite. An exception was saved to the overruling of the the objection. No authority is shown in support of such an objection, and we can conceive of no reason why it should have been sustained.

The testimony tended to show that the defendant was in the constant habit of assailing the plaintiff with vile and abusive language, applying to him the most revolting epithets, and accusing him of having committed adultery with various women, including his step-daughters and his own sisters. The defendant, as a witness, denied having used the expressions alleged, except as to the general charge of adultery, which she declared was true. The plaintiff, as a witness in his own behalf, was permitted, against the defendant's objection, to describe his wife's often repeated abusive language to him, at times when they were alone. This is assigned for error.

In the case of *Vogel* v. *Vogel* (13 Mo. App. 588), recently decided by this court, we held, on the authority of *Moore* v. *Moore* (51 Mo. 118), and *Buck* v. *Ashbrook*, (51 Mo. 539), that private communications between husband and wife can not, in Missouri, be testified to by either. Were the question one of first impression we might, in interpreting the rule by its history, its reason, and its policy, be inclined to make a distinction in its several applications. The fundamental policy of all well ordered society regards the marriage relation as sacred to the most unreserved confidence between the parties. The intimate union of their interests, and of the elements of social welfare and happiness which either may enjoy, seem to demand that mutual revelations between man and wife shall be not less free from exterior scrutiny than are one's secret communings with himself. A man must be able to impart to his wife the most critical conditions of his affairs, or even his guiltiness of crime, in the full assurance that no process of law can compel her to a violation of his confidence. But a fair application of this reasoning seems to stop at the point of

Digitized by Google

actual disclosures made between the parties. A vituperative epithet is not such. It has long been settled in Missouri, that charges of infidelity made by the husband without any just cause, are such personal indignities as the statute contemplates in defining the grounds for a divorce. *Lewis* v. *Lewis*, 5 Mo. 278; *Hooper* v. *Hooper*, 19 Mo. 355. If it be the policy of social regulations in this state, that the making of such charges may properly eventuate in the dissolution of the marriage tie, the question may be asked, how can that policy be sustained by a rule which, in many cases, closes the mouth of the only person who can testify to the injurious fact, and for whose especial protection the law was made? There is no statutory exclusion of the testimony under consideration. The decision in *Moore* v. *Moore* (51 Mo. 118), is announced as an interpretation of the common-law rule; a former statute on the subject having been repealed. In Massachusetts, however, there appears to be a different understanding of the rule. A statute prohibited any married person from testifying to "private conversations" between the married parties. In *French* v. *French* (14 Gray, 186), the court said: "This exclusion of testimony is, however, to be strictly confined to mere conversation between the parties, and not to be extended so far as to exclude evidence of everything said by one of the parties in the absence of other persons. Mere abusive language addressed by one party to the other, when they were not in conversation, might be the subject of testimony by the party to whom it was addressed, and *would be competent evidence*."

But whatever might be our views as to these several propositions, the last ruling of our supreme court, on any question, is the law for us. The language employed in *Moore* v. *Moore* (*supra*), might possibly be regarded as a *dictum* expressing only a generality not pertinent to the real question before the court. But in the later case of *Buck* v. *Ashbrook* (51 Mo. 539), it is distinctly declared that the trial

Digitized by Google

court committed no error in excluding so much of the testimony of a married woman, as stated that she had protested to her husband against his use of her name or property in business. It is here again intimated that the propriety of such an exclusion results from "the common law still in force as to her inadmissibility, respecting conversations with her husband," etc. The case of *Moore* v. *Moore* is referred to in the same opinion. We have, in these two cases, an unmistakable expression of what our supreme court understands to be the meaning of the common-law rule. This is, that no private conversations or communications, of whatsoever nature, between husband and wife, can be testified to by either of the parties, as a witness. The mere protest of a wife against her husband's conduct, on the one hand, and vituperative language, on the other, are equally removed, if either be so, from the category of confidential disclosures. We must, therefore, adhere to our ruling in *Vogel* v. *Vogel* (13 Mo. App. 588), that while both parties may testify in a divorce suit, neither should be permitted to relate private utterances of any description which have been addressed by the one to the other.

But it does not always follow that a judgment must be reversed, when incompetent testimony has been admitted in the trial. If there be other evidence which was competent and ample to bring about the finding of fact, there are few cases in which it would not be a gross injustice to disturb the result. *Bradford* v. *Pearson*, 12 Mo. 71; *Ridgway* v. *Kennedy*, 52 Mo. 24; *Blackwell* v. *Baily*, 1 Mo. App. 328. In *Vogel* v. *Vogel*, every accusation, or vituperative expression used by the defendant, which could have been construed as a personal indignity within the statute, was uttered by the plaintiff alone, and appeared not to have been heard by any other witness. Quarrels had occurred in the presence of third persons, but the charges of infidelity and other offences were omitted on those occasions. The proofs in the present case were very different in this impor-

Digitized by Google

tant particular. Gross charges of infidelity, made openly by the wife against her husband, were detailed by a number of witnesses, besides the plaintiff. In fact, the defendant, both in her answer and in her testimony, admitted the making of those charges, and averred that they were true. Her case could not have been unfairly prejudiced by the plaintiff's testimony to the same effect. *Blackwell* v. *Baily*, 1 Mo. App. 328. The only issue made in this connection was as to the truth of the charges. On this point the only incompetent testimony introduced was that of the defendant, who swore that the plaintiff had confessed to her his unchastity.

Much of the argument here presented for a reversal is directed to a discrediting of the plaintiff's testimony, an impeaching of his conduct in various particulars, as viewed from the defendant's standpoint, and a general contention against the finding of the court, as being contrary to the weight of evidence. We can not find, in any of these matters, the least reason for disturbing the judgment. Whether the plaintiff's statements were or were not worthy of credence, is a question which was fairly before the trial court, and nothing is shown to cast a shadow on the court's determination of it, unless we are to take the defendant's statements as absolutely true wherever she contradicts the plaintiff. In nearly every instance, where these contradictions occur, the plaintiff is corroborated by other witnesses; while the witnesses who, from their personal connection with the facts, should be able to corroborate the defendant, flatly contradict her. Her manner of testifying was anything but encouraging to a ready faith in her accuracy of statement. General charges against the plaintiff fell glibly from her lips, but when reduced, by cross-examination, to specific details, proved little more than the overwrought suspicions of an imaginative and jealous woman. We may dismiss this branch of the inquiry with the remark that, without admitting that this is a proper case for an appel-

Digitized by Google

late revision of the weight of evidence on either side, we think there was no rational escape from the conclusion reached by the trial court, upon the facts, as presented.

It is objected that witnesses were erroneously permitted to testify favorably of the plaintiff's general character and reputation. The most prominent feature of the defence was a direct attack upon the plaintiff's moral habits, and his title to social respect. He had a right to meet this with proofs of a good general reputation, as to the vices implied in the charge. *O'Bryan* v. *O'Bryan*, 13 Mo. 16. Some of the witnesses spoke of his general character in other respects. This testimony was irrelevant, and might well have been excluded. But its admission constitutes no ground for a reversal.

The defendant offered to prove that, during the pendency of one or more former suits, which were dismissed, the plaintiff had attempted, by the use of money, to obtain the defendant's consent to a collusive divorce. The testimony was properly excluded. It had no relevancy to any issue in the present case.

The defendant moved for a new trial, with an affidavit alleging that she was surprised, on the trial, by the imputations upon her character for truthfulness; that she had ever borne a spotless reputation outside the circle of her husband's depraved associates, and had no reason to fear such an attack. The affidavit covers nearly ten pages of the record with an account of domestic infelicities and grievances borne by the defendant, which might have been very properly introduced at the trial, but which are wholly out of place where they appear. The affiant says that she will be able to prove all the facts stated, if a new trial be granted, but gives no reason for her failure to prove them in the trial, except that her counsel at the time thought it unnecessary. The application for a new trial is lacking in the first essentials of such a proceeding, upon the grounds stated. The defendant had no right to claim a surprise in

Digitized by Google

the testimony impeaching her reputation for veracity. The issue was invited by herself when she went upon the stand and contradicted the sworn statements of the plaintiff and other witnesses. It is to be presumed that she intended all this beforehand; since it is not to be supposed that her facts were invented for the occasion, and on the spur of the moment. Having determined on this line of defence, she was bound to anticipate the plaintiff's employment of the methods in common use for its defeat. But, aside from this, her claim of a surprise is thoroughly destroyed by allegations in her affidavit to the effect that she desired, during the trial, to have subpœnas issued for certain witnesses who would vindicate her character for truthfulness, but her counsel refused to have them issued. Also, that there were witnesses present in court who would have done the same, but her counsel refused to call them. She must abide by the acts and omissions of her counsel. It is manifest that the defendant was not prevented from offering the desired testimony, without fault on her part, and after the exercise of all reasonable diligence in an effort to produce it.

An argument is presented, that the plaintiff was not an injured party, and therefore not entitled to a divorce because, in a former suit against the defendant, which was dismissed, he had falsely charged her with adultery, and this fact was shown in evidence in the present case. The defendant's answer sets up no such charge. An affirmative defence must be pleaded in a divorce suit, as well as in any other. The only use which the defendant could have made of the fact stated, would have been in a charge in the nature of a cross-bill, of such indignities offered by the plaintiff to the defendant, as to render her condition intolerable. The answer contains only denials, with an inferential charge of adultery, committed by the plaintiff. As the pleadings stand, there is no necessary inference that the plaintiff's charge in the former suit had any injurious effect upon the defendant's condi-

Digitized by Google

tion. It may well be, that bad conduct on the part of a plaintiff, not alleged in the pleadings, but proved on the trial, may be of such a character as to show that the plaintiff is not an injured party, and therefore not entitled to a divorce. But this is not the case here. The plaintiff's conduct — consisting of nothing more than an allegation in a petition, inserted by his lawyer, and of which he says he was ignorant at the time — may have had no effect on the sensibilities of the defendant, and so have been utterly harmless as to her. As she does not choose to plead that it was otherwise, we can not judicially put the words in her mouth and determine that it was so.

Upon a careful examination of the record, we find in it no error of which the defendant can justly complain. We see nothing that is entitled to serious consideration, in the point made upon the conduct of the plaintiff's attorney. The letter written by him to the prosecuting attorney, signed with the name of the firm of which he was a member, and asking him to look into a matter of official duty for Mrs. Miller, had no tendency to prove that the writer was her attorney in the present defence, or that he had consulted with her about it. No facts are shown which were not perfectly consistent with good faith in the attorney's representation of the plaintiff in the present proceeding. The judgment is affirmed. All the judges concur.

BAKEWELL, J., delivered the opinion of the court on a rehearing.

The affidavits in support of the motion for a new trial in this case set up various matters of recrimination, some of which, had they been pleaded, and had they been shown on the trial to have occurred after the last of the frequent condonations, of which there was evidence, would have been a bar to plaintiff's suit. They were not pleaded, and were not proved. Appellant alleges in her affidavit, as to these matters of recrimination, that her counsel was advised of them,

Digitized by Google

but refused or neglected to plead them, and that she had competent witnesses as to these matters, and in rebuttal of testimony introduced by plaintiff to impeach her character, some of whom, though they were in attendance at the trial, her counsel refused to call, and some of whom he neglected or refused to summon, though directed by her to do so, and advised as to what they would testify.

We were of the opinion that, if these allegations were true, they furnished no ground for any interference on our part with the action of the trial court in refusing a new trial.

A motion for rehearing was filed, and in support of it, one of the counsel for the appellant here, who did not represent her in the trial court, filed a brief. We carefully considered this motion, and the brief that accompanied it; and we ordered the case down for rehearing, on the single question whether, considering the character of the litigation, and that a divorce suit is not a mere controversy between private parties, but a proceeding in which the State may be said, in a certain way, to be a third party, a new trial ought to be granted, where it appears that by the misprision of counsel, defendant has lost her opportunity of setting up matter which, if pleaded and proved, ought to bar the divorce, and there is reasonable ground to believe that the decree would have been otherwise, and the divorce denied, but for the misprision of counsel.

This point had not been argued when the cause was sub mitted here. Nor, though the rehearing has been granted on this ground alone, and that was announced from the bench at the time, have we been aided in any way in our examination by learned counsel for the appellant. Neither of them appeared at the oral argument or by brief.

Although it was urged by counsel for appellant here that the recriminatory matter was omitted by design from her answer, and without fault of counsel, for the reason that defendant did not desire to file a cross-bill because she did not want a divorce, it is plain that there is nothing in that

Digitized by Google

position. Recrimination is the defence that plaintiff has done what is ground for divorce. It bars the suit, whether defendant is guilty or not. It must be alleged and proved. *Derby* v. *Derby*, 6 C. E. Greene (N. J. Eq.), 60; *Reid* v. *Reid*, *Ib.* 331. But, of course, it may be set up merely as a bar, and need not be set up in a cross-petition with a prayer for divorce on defendant's side. If she is an injured party, she is not to be divorced against her will, merely because, as a bar to her husband's application, she sets up matter which, if she were innocent, would, if she chose so to use and plead it, entitle her to a divorce. "If the matter of defence appears, either by plaintiff's own admissions upon the record, or by the testimony of his witnesses, the court, of its own motion, will take the objection at the hearing," says Mr. Bishop. Mar. & Div. 2, sect. 338. But, although, where such matter, or the fact of condonation, though not pleaded, appears, it is fatal to plaintiff's claim, it would seem to be contrary to all principle to hold that affirmative matter injurious to the character of plaintiff, of a recriminatory nature, could be introduced on a trial to which plaintiff was a party, without any notice to him, or any opportunity to rebut; and though the court will exercise a constant watchfulness in the interest of the commonwealth to prevent the granting of a divorce through the connivance or collusion of the parties, yet it is plain that the ordinary rules of pleading and procedure are not to be disregarded; and, indeed, our statute is express that, "like proceedings shall be had in such causes as are had in other civil suits."

The sum of the matter seems to be well stated by the learned author before quoted: "The public, which in the last chapter we saw to be a third party in these suits, does not ordinarily appear by counsel, and, when without counsel, does not plead. As against this party, when only thus represented by what is called the conscience of the court, the plaintiff is equally entitled to his decree on his case

Digitized by Google

being duly and fully proved." (Unless, of course, and this, the writer has just said, the defendant sets up and proves either connivance, or collusion, or condonation, or recrimination, or the right is lost by lapse of time.) "But this party, unlike the others, never loses a right by laches; and so, whenever a defence comes out in the evidence, whether alleged or not, it is fatal to the proceeding. A maxim in these suits, therefore, is, that a cause is never concluded as against the judge; and the court may, and to satisfy its conscience, sometimes does, of its own motion, go into the investigation of facts not contested by pleadings."

But, though the cause may not be concluded against the trial judge by the pleadings and evidence, it must necessarily be concluded against the appellate judge, where he is unable to see that the trial court has erred on the trial or abused its discretion in refusing to grant a new trial. The trial court in a divorce proceeding, might, undoubtedly, on the principle that it represents the third party to the suit, grant a new trial in a divorce proceeding in cases where, were it a mere action between the parties, it might seem oppressive to do so. But we can not see that the court ought to have done so on the affidavits filed in this case. The defendant appears, from her testimony, to be unguarded in her statements made under oath, and the affidavit of defendant in support of her motion is not worded with the caution which should characterize a statement to a court of justice which is to be attested by the dreadful sanction of an appeal to the great Judge of the living and the dead, as to the substantial accuracy of what is written down. The trial judge could form a much better opinion than we can do as to the probability of these allegations that the defendant's case was prejudiced by the not pleading these matters of recrimination, and not introducing the witnesses of whom she speaks. The attorney who represented her upon the trial keeps silence as to these matters, and does not file any affidavit in corroboration of these extraor-

Digitized by Google

dinary statements; nor has he the character of an undiligent and incompetent or unconscientious practitioner. Nor are we referred to any case in which a divorce obtained in the trial court has been set aside and a new trial granted on the ground that the counsel for defendant was incompetent and mismanaged her case.

We think that the doctrine that the State is interested and a party to every proceeding for divorce, is not to be interpreted to mean that the appellate courts, upon a surmise that perhaps defendant has a defence, which, if properly pleaded and proved, might have barred the action, are warranted in setting aside a decree of divorce, where the trial court has refused to interfere.

We think that the judgment of the circuit court should be affirmed. It is so ordered. Judge LEWIS concurs. Judge THOMPSON dissents.

ESTHER ROSENBURG ET AL., Respondents, v. J. WILL BOYD ET AL., Appellants.

December 4, 1883.

14a	429
32a	454
14	429
44	261
44	279
14	429
45	599
14	429
49	339
51	378
14	429
78	130
14	429
90	75

JUSTICES OF THE PEACE — STATEMENT. — A statement before a justice that the "defendant is justly indebted to the plaintiff in the sum of $162, for money had and received heretofore, to wit: on the — day of ——, 1882," is not sufficient to support a judgment for the plaintiff.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and judgment.

C. M. NAPTON, for the appellants.

MOSES L. WIEDER, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace, upon the following statement of cause of action: "Plaintiffs state that they are husband and wife, and that defendants is

[sic] justly indebted to them in the sum of one hundred and sixty-two and fifty one-hundredth dollars ($162.50), for money had and received heretofore on the —— day of ——, 1882. Wherefore plaintiffs ask judgment against defendants for the sum of $162.50 with interest and cost of this action.'' The plaintiffs had a judgment before the justice, and the defendants appealed to the circuit court. The cause was tried anew in the circuit court, and the plaintiffs again had a judgment.

The only point which we shall consider is that raised by the defendants' motion in arrest of judgment, that the statement of the cause of action before the justice was not sufficient to support any judgment in favor of the plaintiffs. We are of opinion that this objection is well taken. Objections of this kind have always been regarded with disfavor in the supreme court and in this court; and the rule has always been in this state not to apply the strict rules of pleading to statements of causes of action before justices of the peace, especially where the parties have gone to trial in the circuit court without objection to the introduction of evidence on the ground of insufficiency in such statements. On the contrary, the rule has always been to regard such a statement as sufficient, where, by any fair intendment it identifies the subject-matter of the suit with sufficient certainty to bar another action. *Barbaro* v. *Occidental Grove*, 4 Mo. App. 429; *Smith* v. *Monks*, 55 Mo. 106; *Wood* v. *Railway Co.*, 58 Mo. 109. But the statement in the present case can not by any possible intendment be held to identify the cause of action with sufficient certainty to bar another action on the same demand. It refers to no circumstance of time or place or transaction from which the cause of action might be identified. The sole thing stated is that the defendants are indebted to the plaintiffs — it does not even state which plaintiff — in a certain sum of money, had and received; it does not tell when or from whom it was had and received; it does not in any way

Digitized by Google

refer to or identify the transaction out of which the cause of action, if any, arose. In fact, we can see nothing in this statement which makes it any more definite than it would have been if it had read, "The plaintiffs state that the defendants are indebted to them in the sum of $162.50, for which they ask judgment." It is merely the statement of an indebtedness, which is a conclusion of law. It is not "a statement of the *account*, or of the *facts* constituting the cause of action upon which the suit is founded," as required by section 2851 of the Revised Statutes. It is not the statement of any fact at all. We regret that we feel obliged to reverse the judgment upon this ground; but liberality in construing such statements must stop before the statute is entirely repealed.

The judgment of the circuit court will accordingly be reversed. The proper judgment will be entered in this court, that the defendants go hence and recover their costs. It is so ordered. All the judges concur.

JESSE ARNOT, Appellant, *v.* AUGUSTUS BRANCONIER, Respondent.

December 4, 1883.

1. **BAILMENT — NEGLIGENCE — BURDEN OF PROOF.** — A bailee of a chattel received in good condition and injured while in his possession in a manner which tends to show culpable negligence on his part, must show such facts as will exonerate him.
2. —— Proof that the defendant hired of the plaintiff, a livery stable keeper, a horse and buggy to take a drive; that he failed to return them, and that they were subsequently found in the suburbs of the city in a badly damaged condition, makes a *prima facie* case in an action by the bailor for damages.

14 431
55 245
14 431
65 526
14 431
141m 681
14 431
82 558

APPEAL from the St. Louis Circuit Court, ADAMS, J. *Reversed and remanded.*

C. M. NAPTON, for the appellant: The burden was on the defendant to account for the injury. Schouler's Bailments, 23–25; *Bush* v. *Miller*, 13 Barb. 481; *Logan* v. *Matthews*, 6 Barb. 417; *Goodfellow* v. *Meegan*, 32 Mo. 28; *Wisner* v. *Chesley*, 53 Mo. 547.

GARESCHÉ & HOBEIN, for the respondent: The plaintiff must prove a *prima facia* case of negligence. *Perry* v. *Beardslee*, 10 Mo. 574; *Beardslee* v. *Perry*, 14 Mo. 93; *McCarthy* v. *Wolff*, 40 Mo. 523.

THOMPSON, J., delivered the opinion of the court.

The substance of the petition is that the plaintiff, a livery stable keeper, hired a horse and buggy to the defendant, and that while the same were in his charge, they were damaged through his negligence in the amount sued for. At the close of the plaintiff's case, the court instructed the jury that the plaintiff could not recover, and accordingly the only question in the case is whether the evidence of the plaintiff made out a *prima facie* case of negligence such as shifted the burden of proof on the defendant.

This evidence was, without abbreviation, as follows: "Claude Kilpatrick testified for the plaintiff as follows: Jesse Arnot is the owner and proprietor of a livery stable in this city. I am employed there as book-keeper and collector. In the early part of last August the defendant hired a horse and buggy from plaintiff to take a drive, for which the charge was $4. He drove the buggy himself, and when he left the stable the mare was in good condition. She was a good driving animal, and was all right when defendant started out with her. He did not return her at all. We were informed that she had met with an injury, and sent a boy after her, who found her in the suburbs very seriously injured. She was injured very badly, so as to render her almost useless. She was damaged to the extent of $150. The buggy and harness were also very much damaged; the buggy to the extent of $17.75, and the

Digitized by Google

harness to the extent of $10. The mare has never been of any account or use since then.

"John H. Holmes testified that he was an officer of the Humane Society; that he had received a notification of a wounded horse having been found in the suburbs of the city, seriously wounded; that he went there and found a roan mare seriously injured, with her right fetlock cut to the bone, and otherwise very badly disfigured; had seen the same mare in Arnot's stable, and seen her coming and going out from that stable very frequently; that at the time he found her, she was unhitched.

"Dr. John Crowley testified that he is a veterinary surgeon; was called to attend a horse belonging to Jesse Arnot; that he found the animal in the suburbs of the city; that she was a roan mare; that he found her seriously injured, having her right fetlock cut, and was otherwise badly bruised; that he had seen her since that time in Jesse Arnot's stable; that he was acquainted with the value of horses, having frequently bought and sold them; that in his opinion when he first saw this mare, she was so seriously injured as to be of no use to the owners, and in fact he told them they had better give her away; that she was removed to Arnot's stable, where he saw her frequently; that while there she had received careful attention, and at this time would be of some little value; leaving out of consideration her speed, he should say she was originally worth in the neighborhood of from $150 to $175."

On this case we are of the opinion that the ruling of the circuit court was erroneous. This ruling probably would not have been made, but for some confusion in the rulings of our supreme court upon the question. In *Perry* v. *Beardslee* (10 Mo. 568), it appeared that the plaintiff had hired a slave to the defendants, who were owners of a steamboat, and that while so in the custody of the defendants, the slave ran away and was lost to the plaintiffs. On this evidence, without more, it was held that the plaintiff could not

Digitized by Google

recover of the defendants the value of the slave, since, in order to make out a *prima facie* case of negligence, there must at least be something to throw suspicion upon the conduct of the bailee, where the loss is of that character. On a second appeal in the same case (*Beardslee* v. *Perry*, 14 Mo. 88), the court re-affirmed the same doctrine. In *McCarthy* v. *Wolfe* (40 Mo. 520), it appeared that the plaintiff had placed some cattle in the hands of the defendants as an agister, and that some of them had strayed away and became lost. It was held by the court that "the mere fact of the loss, without showing affirmatively that the same was the result of a failure on the part of the defendant to exercise the reasonable care and diligence imposed upon him by the nature of his undertaking, could not make him liable."

An examination of these cases will show that the court in each case decided the question apparently without examining the decisions of other jurisdictions upon the question. Nevertheless, we should be bound to apply to this case the rule there laid down, whatever our own opinion of its propriety might be, if it had not been distinctly denied by the supreme court in the subsequent case of *Wiser* v. *Chesley* (53 Mo. 547). There the plaintiff sued for some money which he had deposited with the defendant, an inn-keeper, for safe keeping. It was argued in behalf of the defendant, that the burden of proof of negligence was on the plaintiff, and *McCarthy* v. *Wolfe* (*supra*), was cited to this point. But the court, per Sherwood, J., said: "The depositor makes a *prima facie* case when he shows a deposit made and a demand and refusal of the thing deposited. The *onus* is then upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the article with which he was intrusted." Aside from the authority of this last case, we are of opinion that it expresses the better rule. This rule, we think, may be broadly stated thus: Where a person be-

Digitized by Google

comes the bailee of a chattel, and, before the same is restored to the bailor, something happens to the chattel, whether it be loss or damage, such as ordinarily does not happen to a chattel where the skill or diligence which the law requires in the particular kind of bailment is exercised, the bailor, in an action for such loss or damage, is entitled to recover upon merely showing the fact of the bailment, and of such loss or damage during the term of the bailment, unless the bailee shows that such loss or damage took place under such circumstances as exonerate him from liability. This rule has been laid down by the court of appeals of New York in *Collins* v. *Bennett* (46 N. Y. 490, 494), where it is said to rest upon two reasons: 1. That the facts are within the defendant's peculiar knowledge, and he should therefore prove them. 2. That such an injury does not usually occur without negligence on the part of the custodian of the animal. The former of these reasons we regard as quite cogent in connection with the facts of this case. The plaintiff had committed the custody of the horse and buggy wholly to the defendant, and he had taken them beyond the plaintiff's view and control. The plaintiff had no personal knowledge of the circumstances attending the injury; the defendant presumptively knew all about it. Surely a rule which would require the party whose situation implies that he has no knowledge of the circumstances immediately attending the loss or injury to come forward and prove such circumstances, and which would allow the party whose situation implies that he has full knowledge of them, to remain silent, would be at once illogical, inconvenient, and unjust. The object of legal proceedings is to elicit the truth, and in civil cases, the law generally demands the disclosure of the party who knows the facts and who in fairness ought to speak.

The judgment is reversed and the cause remanded. All the judges concur.

Digitized by Google

14a 436
33a 49
14 436
36 58
14 436
65 144

William Schoenlau, Appellant, *v.* Conrad Friese et al., Respondents.

December 4, 1883.

1. Negligence — Damages. — There can be no recovery for an injury to which the plaintiff's negligence directly contributed.
2. Practice — New Trial. — The refusal to grant a new trial on the ground of newly discovered evidence is not ground for a reversal where it does not appear that such evidence would probably change the result.

Appeal from the St. Louis Circuit Court, Lubke, J. *Affirmed.*

C. A. Schnake and P. E. Bland, for the appellant.

Louis A. Steber, for the respondent.

Thompson, J., delivered the opinion of the court.

This is one of the best illustrations of concurring negligence that can be found. The defendant's servant negligently left his horse and wagon unhitched on the street in St. Louis.

The defendant's horses ran away, and, while so running, ran into and killed the plaintiff's horse, in consequence of the plaintiff's horse, on the approach of the defendant's horses, turning from where it stood into the middle of the street. A city ordinance makes it a misdemeanor to leave teams unhitched on the street. Both parties, therefore, are guilty of negligence as matter of law. If the defendant's servant had not been guilty of negligence in leaving the defendant's team unhitched, the plaintiff's horse would not have been killed. If the plaintiff had not been guilty of negligence in leaving his horse unhitched, his horse would not have been killed.

The case was tried by the court without a jury, and the judgment was for the defendant. The declarations of law which were given and refused, clearly indicate that the case

Digitized by Google

was tried upon correct principles of law. We do not consider these at length, because, as the judgment was clearly for the right party it could not be disturbed, even if erroneous declarations of law had been given.

A new trial is asked for on the ground of newly discovered evidence. The evidence claimed to have been discovered since the trial, was that of a person who swore that he was a witness to the catastrophe, and that the defendant's horses were running down the street in such a direction that the plaintiff's horse would not have been struck if it had not turned out into the street. Applications for new trial on the ground of newly discovered evidence are looked upon by the courts with disfavor, and are never granted unless it appears that the evidence claimed to have been newly discovered would probably change the result. The learned judge, who was trier of the facts in the circuit court, had a much better opportunity than we have to judge whether the evidence claimed to have been discovered since the trial in this case would have changed the result. Indeed, we have no basis in this record on which to form a proper judgment upon this question, since the bill of exceptions does not purport to set out the testimony of the witnesses in detail, but merely states that there was evidence tending to show certain facts. Such a bill of exceptions is always to be commended, where the appellant merely seeks to invoke the judgment of this court upon rulings made at the trial; but it manifestly affords no basis upon which we can say whether the newly discovered evidence of a single witness would, on another trial, produce a different verdict. For aught that we can see, twenty bystanders, each having as good an opportunity to view the catastrophe as the newly discovered witness, may have given evidence the reverse of that which his affidavit showed that he would give. Moreover, looking at the substance of this affidavit, it seems that it proffers little more than the *opinion* of a single witness, improbable in itself, that the plaintiff's

Digitized by Google

horse would not have been struck by the pole of the defendant's wagon if it had not turned out into the street. Upon the whole, we can not see that the court committed error in refusing a new trial on this ground.

The judgment is accordingly affirmed. All the judges concur.

A. O. Engelman, Respondent, *v.* William Skrainka et. al., Appellants.

December 4, 1883.

Contracts — Public Policy. — A contract whereby a person binds himself to refrain from competing for public work is void as against public policy.

Appeal from the St. Louis Circuit Court, Horner, J.

Reversed and judgment.

R. E. Rombauer, for the appellants: The contract is void as in restraint of trade. — *Atchison* v. *Mallon*, 43 N. Y. 149; *The People* v. *Stephens*, 71 N. Y. 527; *Gibbs* v. *Smith*, 115 Mass. 592; *Snow* v. *Charpenning*, 20 Cal. 182; *Durfee* v. *Moran*, 57 Mo. 379; *Hook* v. *Turner*, 22 Mo. 333; *Lawnin* v. *Bradley*, 13 Mo. App. 361.

Broadhead & Haeussler, and C. V. Scott, for the respondent: Contracts which are limited to time and place though tending to restrain trade are not in a legal sense in restraint of trade, and not necessarily void. — *Sterns* v. *Barrett*, 1 Pick. 443; *Pierce* v. *Woodward*, 6 Pick. 206; *Noble* v. *Bates*, 7 Conn. 307; *Bcend* v. *Dennis*, 6 Ind. 200; *Presbury* v. *Fisher*, 18 Mo. 50; *Long* v. *Fowl*, 42 Mo. 549; *Alger* v. *Thatcher*, 13 Pick. 51. When the restriction is not general as to space or unlimited as to time, but only partial and special, the contract is valid. — *Peltz* v. *Eichele*, 62 Mo. 171; *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522; *Wiggins Ferry Co.* v. *Railroad Co.*, 73 Mo. 389.

Digitized by Google

THOMPSON, J., delivered the opinion of the court.

The substantial question in this case is whether the contract sued on is against public policy, as being a contract designed to stifle competition at biddings for public work. It appears that the plaintiff, being the owner of a stone quarry in St. Louis, and the defendants, being persons who followed the business of contractors of public work on the streets of the city, and the time of year drawing near at which the annual letting by the city of the public work to the lowest bidders was to be made, the plaintiff and defendants entered into the following contract: "This agreement made and entered into in duplicate, this twenty-first day of May, 1881, by and between Skrainka & Veiths, of the first part, and A. O. Engelman of the second part.

"Witnesseth, that in consideration of the covenants and agreements hereinafter set forth and entered into, and of the sum of $5, each to the other paid at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, said party of the first part hereby contracts to purchase and receive from the party of the second part, and the party of the second part contracts to sell and deliver to the party of the first part, from July 1, 1881, to June 30, 1882, not less than six hundred and fifty squares of macadam, of such dimensions and quality as are or may be required by the contracts and ordinances of the city of St. Louis, Missouri, and acceptable to the proper officers thereof, for the repair of streets in the fifth district during said year; said macadam is to be delivered at such points or places in said district and at such times as said first party, or said city or authorized officer thereof may require or direct; and, as nearly as may be, in equal monthly instalments. On the first day of each month said party of the first part is to pay the party of the second part for all macadam so delivered in the preceding month, ninety-five per cent of the price per square which the city may be paying therefor to the contractors for that year for repairing the

Digitized by Google

streets of the district where said macadam may be delivered; reserving, however, five per cent thereof until the last payment, as a forfeit, to insure the faithful performance of this contract.

"In consideration of the premises, said party of the second part hereby covenants and agrees to and with said party of the first part, that he will not remain or become interested, directly or indirectly, in any contract, public or private, for the repairing of streets during said year in said district, nor in any contract for the sale and delivery to any other party, of macadam for the repair of streets within said district; and that he will not voluntarily alienate or become divested of the ownership, management, or control of any quarry or part thereof now owned, leased, or operated by him without the consent of the party of the first part, indorsed hereon in writing.

"The parties hereto covenant, each with the other, faithfully to observe and to discharge the terms, obligations and agreements herein set forth; and for any violation or evasion thereof, the offending party covenants and agrees to pay to the other as liquidated damages, the sum of $1,000, and to relinquish all and every claim, demand, payment or other benefit under this agreement. The parties hereto further covenant that, to secure the faithful performance of this agreement, each will execute and deliver to the other a bond, with satisfactory and sufficient sureties, in the penal sum of $2,000, and that the giving of such bond is to be essential to the validity of this contract.

"In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, the day and year first herein written."

Considerable testimony was given illustrating the circumstances under which the contract was made, all tending to make it clear that the contract was made in pursuance of a scheme by which the plaintiff, in consideration of getting from the defendants, for a certain amount of rock to be sold

Digitized by Google

to them during the succeeding year, as they should require it, as much as the defendants might get from the city, less five per cent, upon an agreement that he should not be a bidder for the city work. He himself testifies orally, that this was the agreement; but his oral testimony was not necessary to make the fact appear, for the contract shows it. It is an uniform rule, founded in public policy, that any contract, the necessary effect of which is to stifle competition in bidding at public or private sales, or at lettings of public or private work, is void. *Durfee* v. *Moran*, 57 Mo. 374, 379; *Wooton* v. *Hinkle*, 20 Mo. 290; *Hook* v. *Turner*, 22 Mo. 333; *Lawnin* v. *Bradley*, 13 Mo. App. 361; *Swan* v. *Chorpenning*, 20 Cal. 182; *Gibbs* v. *Smith*, 115 Mass. 592; *The People* v. *Stephens*, 71 N. Y. 527; *Atchison* v. *Mallon*, 43 N. Y. 149.

The contract sued on falls clearly within this rule, and therefore the plaintiff was not entitled to judgment for a breach of it. The court should have given the declaration of law asked for by the defendants, that under the pleadings and evidence, the plaintiff was not entitled to recover. For the error of refusing this instruction, the judgment will be reversed, and judgment will be entered here for the defendants. It is so ordered. All the judges concur.

EDWARD A. PETTIGREW, Respondent, *v.* ST. LOUIS ORE AND STEEL COMPANY, Appellant.

December 4, 1883.

MASTER AND SERVANT — NEGLIGENCE. — A master is not liable for an injury inflicted by a servant upon a fellow-servant, where the act which causes the injury is not within the scope of the servant's duty.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Reversed and remanded.*

Digitized by Google

HENRY HITCHCOCK, for the appellant.

A. A. PAXSON and A. R. TAYLOR, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action for damages for an injury received by the plaintiff, through the negligence of a fellow-servant in the employ of the defendant, under the following circumstances. The plaintiff was employed by the defendant to weigh steel on cars of the defendant, which cars were pushed or hauled upon the scales by a small locomotive engine. The engine was in charge of one Obenhaus, as engineer, assisted by a boy sixteen years old named Woods, as fireman. There was evidence tending to show that Woods had been allowed, on temporary occasions, by Obenhaus, and on one occasion by the defendant's assistant master mechanic, to have charge of the engine. It is a part of the plaintiff's case, as shown by his petition, that the defendant had been negligent in suffering an inexperienced boy to have charge of the engine, and, for the purpose of what we are about to decide, this may be conceded, though we do not wish to intimate an opinion that this was so in fact.

On the occasion in question, the engine was standing near the place where the plaintiff's duties required him to be. Obenhaus had got off on the right side, and Woods had got off on the left side, and had begun rubbing the engine. As soon as Woods saw Obenhaus on the other side of the engine, Woods jumped upon the engine and pulled the "pet-cock" for the purpose of *dousing* Obenhaus with a stream of cold water, in return for a similar prank which Obenhaus had played upon Woods. Unfortunately, instead of cold water, a jet of hot water came out of the "pet-cock," and struck the plaintiff in the left eye, injuring it to such an extent that he has entirely lost the use of it.

At the close of the plaintiff's case, the usual instruction was asked by the defendant, that under the pleadings and evidence, the plaintiff was not entitled to recover. This

Digitized by Google

instruction the court refused to give. This refusal, we are clear, was error. For the purpose of making more clear the single ground on which we place our judgment, we shall concede the negligence of the defendant in suffering a boy of sixteen years to have temporary charge of a locomotive engine. We shall also assume, what the defendant disputes, that the plaintiff was, at the time, where he might properly be. We shall, moreover, assume that the law is that a master is liable for a wanton or malicious act of his servant, if done within the general scope of the servant's employment. But it is, nevertheless, clear that the defendant is not liable, because the act was not done within the scope of Woods' employment. Woods was acting at the time entirely outside the matter of his employment, endeavoring to effect a purpose of his own, namely, the playing of a trick upon Obenhaus. There is no conceivable ground on which the defendant can be made liable, unless it is the law that the owner of movable property is liable for every possible injury which one in his employ may commit by the use of the property. Such is not the law. If three farm laborers were at work in a field, and two of them should get into a playful scuffle, and in the scuffle one of them should hit the third in the eye with a hoe, would any one say that an action for damages could be sustained against the farmer, merely because he was the owner of the hoe? And yet, such a conclusion in that case would not be any more absurd than the conclusion which makes the defendant liable in this. Moreover, there was no causal connection between the negligence of the defendant, if such there had been, in allowing the boy Woods to have occasional charge of the engine, and the accident which happened; since the evidence shows without dispute, that he was not in charge of the engine at the time when the accident happened, but that Obenhaus was in charge of it.

The judgment is reversed, and the cause remanded. All the judges concur.

Digitized by Google

14 444
174s 228

H. BRINSMADE ET AL., Appellants, *v.* ROBERT GROLL, Respondent.

December 4, 1883.

MARRIED WOMEN — WITNESSES. — In an action against the husband, the wife is not a competent witness, though her testimony is to the effect that the right is in her and not in the husband.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Reversed and remanded.

W. B. HOMER, for the appellants.

L. J. SMITH, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action of replevin, before a justice of the peace, for a sewing machine. On an appeal to the circuit court, and trial before a jury, the judgment was for the defendant. The plaintiffs' evidence tended to show that the plaintiffs sold the machine to the defendant for $55; that the defendant executed his promissory note for the same, expressing that the same was to be paid at the rate of $3 per month; that he paid $3 down, and received a receipt for the same upon the note; that, at the same time, he executed a deed of trust, in which he conveyed the machine to the plaintiff Brinsmade in trust, with power to take possession of and sell the same upon default in any of the payments stipulated for in the note, and that, defaults in these payments having been made, the plaintiffs brought the present action.

The evidence of the defendant tended to show that the machine was sold to his wife, and not to himself, and that he never executed the note and deed of trust. The defendant's wife was permitted to testify, against the objection of the plaintiff, that the machine was bought by her; that the first payment of $3 was made by her, not at the office

of the Howe Sewing Machine Company, as the plaintiffs' witness testified, but at her own house; that the subsequent payments had been made by her, and that she had refused further payments because the machine had gotten out of order and the Howe Sewing Machine Company had refused to repair the same, or to substitute a good machine for the same.

The only question which we shall consider relates to the admissibility of this testimony of the defendant's wife. We think that this testimony was not admissible. The testimony of a wife in an action against her husband is not admissible at common law. No statute of this state has created an exception to this rule, such as would admit the testimony of the defendant's wife in this case. Section 4010 of the Revised Statutes would have admitted her to testify, if she had been a party to the record, other than a nominal party. *Tingley* v. *Cowgill*, 48 Mo. 291; *Fugate* v. *Pierce*, 49 Mo. 441; *Harriman* v. *Stowe*, 57 Mo. 93; *Owen* v. *Brockschmidt*, 54 Mo. 285. Nor was she within any of the exceptions of the common-law rule of disqualification created by section 4014 of the Revised Statutes. Unquestionably, the law does not, especially since the act of 1875 (Rev. Stats., sect. 3296), which allows a married woman to own personal property and deal with it as if sole, intend to seal her mouth as a witness, and prevent her from asserting or protecting, by her oath in a court of justice, the new rights with which the legislature has clothed her. But before she can do this, she must stand before the court as a party asserting such rights in the particular suit; and if, in her husband's suit, she appear as a witness in his behalf, although to testify that the right is in her and not in her husband, yet, in contemplation of law, she is testifying for him and not for herself, and is therefore incompetent.

For this error, the judgment of the circuit court is reversed and the cause remanded. All the judges concur.

Digitized by Google

J. J. FUNSTEN ET AL., Respondents, v. N. C. SNYDER, INTERPLEADER, Appellant.

December 4, 1883.

EVIDENCE — RES GESTÆ. — The question being as to whether there was a sale and purchase of a draft, statements of the indorser as to his intention in making the transfer, made without the indorsee's knowledge, are inadmissible.

APPEAL from the St. Louis Circuit Court, ADAMS, J.
Reversed and remanded.
MCKEIGHAN & JONES, for the appellant.
M. N. SALE, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The controversy in this cause turns upon the ownership of a draft drawn by M. L. Cohn on Adler, Goldman & Co. for $965.30, in favor of A. S. Johnson, dated March 6, 1882, and made payable at sight. The draft was indorsed by the payee to the order of J. B. Snyder, cashier, and mailed on March 7th at Newport, Arkansas, to the banking house of N. C. Snyder, the present interpleader, at Grenada, Mississippi. If, in this transaction, the banker became a mere collecting agent for Johnson, and was to hold the proceeds of the draft when collected for Johnson's credit, the judgment rendered by the court below in favor of the plaintiffs was proper, and should not be disturbed. But if the transaction involved a sale of the draft by Johnson and a purchase thereof by Snyder, then the judgment should be against the plaintiffs and in favor of the interpleader. The issue arises upon certain attachment and garnishment proceedings, which need not be described in detail.

The testimony tended to show that there had been a long course of previous dealings between Johnson and Snyder in banking matters. Johnson had, on many occasions, sent

Digitized by Google

drafts to the banker, who, immediately on their receipt, entered their amounts to Johnson's credit on current account. Until the present instance every such draft was collected in due course. Johnson's letter enclosing the draft in controversy contained also two smaller drafts, or checks, with the advice that the writer had, on the same day, drawn on the banker, in favor of W. F. Johnson, for $2,499.70, and a request that this last be paid. A letter was received by Snydor, on the same day with the other, purporting to be from W. F. Johnson, and containing the last mentioned draft, with a request that it be passed to the writer's credit, subject to his draft. Entries were made on the banker's books in accordance with this correspondence. The account of A. S. Johnson was debited by the amount of the large draft, and an account was opened for the like amount in favor of W. F. Johnson, whose checks against the same in various sums were afterwards paid; but not to an extent sufficient to cover the amount of the draft in controversy, whose payment was refused by the drawer (failing acceptance and payment by the drawees) because of the garnishment. Both Snyder and his cashier testified, in effect, that they treated as a purchase the acquisition of the draft in controversy, and that they did not consider it as received for collection only.

There was testimony tending to show that when A. S. Johnson mailed the draft in controversy he was in failing circumstances, and that all the writings and signatures which purported to be those of W. F. Johnson were in fact written by A. S. Johnson; that W. F. Johnson was a younger brother, of irregular habits, and without means. Notwithstanding this testimony, it was conceded in the trial — and the court so told the jury — that no issue was to be considered as to whether the interpleader was assisting A. S. Johnson to defraud his creditors, and that the interpleader's alleged title to the draft was not attacked on

Digitized by Google

the ground of any fraud practiced or attempted upon creditors by either Johnson or the interpleader.

The court permitted the plaintiffs to introduce, against the interpleader's objections, the following testimony of William W. Smith. (The conversation referred to occurred in Newport Arkansas): "I saw A. S. Johnson with this draft the night he left here, and I think he left here on the night of the 7th of March. It was the night after he sold out here. I was down in his room talking to him, and he took the draft out. This was done just a little while before or after seven o'clock p. m., and just before the train was due on which he went off. He indorsed the draft, or wrote across the back of it, that evening at his room at White Hotel. * * * He told me he had wrote to Jake Snyder, whose father had a bank in which Jake was, at Grenada, Miss., and told Jake to take his (Johnson's) money out of the bank and balance his account, and to keep what balance was due him, so that his creditors could not attach or garnishee the bank for what he owed, or for his debts. He said that his cousin got married one week, and broke the next, and that Jake Snyder had done this for him. He said that he now had that fixed, but must go home and fix what real estate he had, so his creditors could not get hold of it."

It seems that this testimony was admitted — although the conversation detailed was not in the presence of the interpleader, nor communicated to him — on the ground that it had a bearing to show what Johnson intended in his transmission of the draft to Snyder, and hence his declarations were admissible, as being part of the *res gestæ*. We think that such an application of the rules relating to *res gestæ* is not sanctioned by either principle or authority. If the matter in issue were solely the intentions of Johnson, or the character of the act done by him, as it might operate to affect his interest, and not that of another, his declara-

Digitized by Google

tions at the time of the act might very clearly belong to the *res gestæ*. But when we come to inquire what was the agreed intention of both the parties to a contract — in other words, what was their contract — the secret intentions of one of them, about which the other neither knows, nor can know anything, are as absolutely foreign to the point sought, as would be the intentions of an entire stranger. It is the mutually communicated, understood, and agreed intentions of the two parties, that constitute their contract. True, the contract is compounded of two distinct and primary elements, to wit, the separate consent or intention of each contractor; and, as a general rule, a title, or obligation, similarly divisible, may be proved by a separate showing of each of its constituents. But where the proposed showing of one such element does, in its very nature, and in all its surroundings, exclude the existence of its essential counterpart, nothing but mischief or injustice can possibly result from its introduction. The case before us furnishes a sufficient illustration of the general truth. If the real facts were, that the interpleader made an absolute purchase of the draft in controversy, and that Johnson sold it to him, as was well understood between them, the testimony under consideration might go far to convince a jury of the contrary, while it would be powerless to throw any true light upon the form of the mutual understanding. An expression of one party's intention has not even a bearing to show the intention of the other, when that other knows nothing about it, and has no opportunity to express either his assent or dissent. Johnson's statements to Smith were made when the interpleader was more than a hundred miles away, in another State. If it be true in law that the interpleader's contract rights may be affected by them, then, in any case where a man proposes to enter into a fair contract with another, and yet to keep open a door whereby he may himself escape its obligations, he has only to tell a third person privately that he

Digitized by Google

intends to make a different contract, or none at all. Even in a case of alleged fraudulent conveyance, it is never admissible to prove against the grantee the fraudulent purpose of the grantor, without a showing that the grantee shared in, or at least knew of, the fraudulent purpose. A participation by both parties is quite as essential to prove an honest agreement, as it is to establish a fraudulent one, to dissimilar ends. The authorities cited by counsel for the plaintiffs have no relevancy to this question. They are cases of declarations made by persons holding a certain possession, and admitted to show the character of that possession — by persons charged with crime, and admitted to show the criminal intent — and cases which serve generally to show how a person's declarations may affect his own rights, liabilities, or *status*, and those of parties claiming in privity with him. They have no application in a case like the present, where the declarations are employed to defeat the contract right of another party, standing in antagonism with that which the declarations are supposed to sustain. We think it quite clear that the testimony referred to was erroneously admitted, and that its character was such as might seriously prejudice the rights of the interpleader. The judgment is therefore reversed, and the cause remanded. All the judges concur.

---

14 450
71 274
14 450
c149m 655
14 450
91 425
14 450
e92 247

JAMES R. HOLT, Respondent, *v.* W. J. SIMMONS ET AL., Appellants.

December 4, 1883.

1. BILLS OF EXCEPTIONS — AMENDMENTS — PRACTICE. — The original bill of exceptions can not be amended in the appellate court.
2. —— Orders of continuances of a motion for a new trial can be made a part of the record only by bill of exceptions.

Digitized by Google

8. —— CERTIORARI.—An application for *certiorari* to amend the record, which does not show that the omitted matter is a part of the record proper, or is called for in the bill of exceptions, will be denied.

APPLICATION for *certiorari.*

Certiorari denied.

DYER, LEE & ELLIS, for the appellants.

A. MOORE BERRY and CHARLES B. STARK, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The appellant suggests that the record of this cause is diminished, in that certain orders of continuance of his motion for a new trial, from the June to the October term and from the October to the December term, 1882, of the circuit court, were in fact made, and yet do not appear in the transcript. No sort of reference to such orders, or either of them, occurs in the bill of exceptions.

It is a well established rule, that the original bill of exceptions can not be amended by means of any proceeding in the appellate court. Its only authentication is the signature of the trial judge, and the clerk can add nothing to the bill which the judge has not thus approved. The paper is usually signed in skeleton, with appropriate calls for motions, instructions, or other matters of exception, which the clerk is authorized to copy in full under such calls. If he fails to insert such matter in the transcript, he may be directed by *certiorari* so to do, since that will be only fulfilling the direction of the judge, wherein the omission had disobeyed it. It is essential, therefore, to *certiorari* for the supplying of such omitted matter, that it shall have been called for or set out in the original bill of exceptions, and that this fact shall appear, in some form, from the clerk's transcript of that document.

As to matters which belong to the record proper, as distinguished from the bill of exceptions, the rule is different. Such matters are in the exclusive keeping of the clerk, and

Digitized by Google

he may lawfully supply any that have been omitted, whenever, by virtue of a *certiorari*, he may have access to the record in the appellate court.

It follows, from what is so far shown, that if the omitted matter in the present case is matter of exception only, and is no part of the record proper — there being nothing here to show that it was contained in, or referred to by, the original bill of exceptions — the writ of *certiorari* must be denied. But if the omitted matter pertains to the record proper of the cause, the writ should be granted. Thus far all the members of this court agree. There is a difference of opinion, however, upon the question of classification. A majority of the court hold that the orders of continuance of the motion for a new trial, if such there were, were matters of exception only, and constituted no part of the record proper. From this proposition Judge THOMPSON dissents.

In *Bateson* v. *Clark* (37 Mo. 34), our supreme court says: "The record proper, by law, is the petition, summons, and all subsequent pleadings, including the verdict and judgment. * * * Exception is matter which arises wholly from *the action of the court* in the progress of the trial, as the admission or rejection of evidence, the sustaining or overruling of some motion, the giving or refusing of instructions, etc. This is strictly no part of the record, unless made so by the bill of exceptions," etc. It would seem that the continuing of a motion for new trial is quite as much a part of "the action of the court in the progress of the trial," as the sustaining or overruling of the same motion would be. The supreme court has, many times, refused to notice a motion for new trial, or in arrest, although set out in full by the clerk in his general record, or memoranda, because it was not incorporated in the bill of exceptions. *Marquis* v. *Clark*, 64 Mo. 601; *Stevenson* v. *Saline County*, 65 Mo. 425; *Collins* v. *Barding*, 65 Mo. 496; *Jefferson City* v. *Opel*, 67 Mo. 394; *Robinson* v.

Digitized by Google

Hood, 67 Mo. 660; *Corby* v. *Tracy*, 62 Mo. 511. It is hardly possible to notice the continuance of a motion without noticing the motion itself. If our appellate practice excludes such notice in one case, it must do so equally in the other. We find nothing in the rulings of the supreme court to justify the position that entries upon the minutes or record of proceedings, because signed by the judge belong, therefore, to the record proper. On the contrary, transcripts of such entries, relating to motions, have been uniformly held to be mere clerical memoranda, and no part of the record proper. "A clerk can not make anything a record which he pleases to write in the order book or sees fit to copy into the record." *Jefferson City* v. *Opel*, 67 Mo. 394.

It appearing, for the reasons stated, that the clerk can not better the record in the appellant's interest, whatever might be his return upon a *certiorari*, the writ is denied. Judge BAKEWELL concurs; Judge THOMPSON dissents.

Dissenting opinion by THOMPSON, J.

I feel obliged to dissent from the opinion of the court which has just been rendered denying the motion for a *certiorari*. My view of the distinction between matter of record and matter of exception is this, whatever rule, order, or judgment in a proceeding emanates from the breast of the judge and is entered on the minutes of the court, and signed by the judge on the following day, is matter of record. The rulings which the judge makes during the progress of the trial, which do not go upon the minutes, and are not authenticated by the signature of the judge upon the minutes of the court, are matters of exception. The only person who can certify the rulings of the court made in the progress of the cause, so they can be noticed in an appellate court, is the judge himself. It therefore follows that matters of exception must be certified by him in a bill of exceptions, for the reason that such matters are not already

Digitized by Google

certified by him on his minutes. But matters which are certified by him on his minutes need not be again certified by him in a bill of exceptions, because this would be a work of supererogation. The orders of continuance, which we are asked to bring up by our *certiorari* in this case, are shown to be orders made and entered on the minutes of the court; and if they are so brought up, we shall know by the certificate of the clerk, that they were in fact made by the judge and entered upon the minutes of the court; and we shall know it upon the same evidence and upon no other evidence than that from which we know that the judgment contained in the transcript was, in fact, rendered. They will be certified to us in precisely the same way in which the judgment is certified to us. Now, before I agree that we are to shut our eyes and stop our ears to the very truth of the case, and to say that this appellant shall not have the benefit of his bill of exceptions, I want to know that there is some distinct and overruling authority which requires me to so hold. No such authority has been cited in the opinion of the court. The well known rule stated by the court that *motions* are no part of the record, unless made so by the bill of exceptions, is no authority for the decision of the court; because motions do not emanate from the judge, but from the parties. The judge does not put them on the minutes of the court, but the clerk puts them there. If they go on the record they go there as the act of the clerk, and not as the act of the court, and this is the reason, and the only reason, as I read the decisions of the supreme court, why that court holds that they are not matters of record unless made so by the bill of exceptions. Our supreme court, in *Bateson* v. *Clark* (37 Mo. 34), and in other like cases, in defining what is the record proper, has, of course, spoken with reference to the question before it. It has never held, so far as I can ascertain, that an order of continuance emanating from the breast of the judge, put upon his minutes by his clerk, and there authenticated by

Digitized by Google

his signature, may not be deemed a part of the record proper in the cause, when necessary to save the substantial rights of a party. In *Nelson* v. *Withrow* (*ante*, p. 270), the motion for new trial had been overruled at the second term after it was entered. One order continuing such motion was shown, not by the bill of exceptions, but by the clerk's transcript of minute entries, and no second order of continuance, such as was formally necessary to carry the motion over to the term at which it was decided, was shown in any way. We looked to the minute entries as evidence that the first order of continuance had been made, and presumed the second order. What we now hold is certainly inconsistent with what we then held; for, if we can not bring up the orders of continuance in this case, because they are no part of the record, we improperly considered the order of continuance in that case for the same reason.

I entertain great respect for the opinion of my brethren, especially upon matters of practice; but I can not forbear saying that I do think that the rule which the court now lays down is entirely opposed to the spirit of our practice act, and to the spirit of our statutes of jeofails; that it is not founded in controlling authority, that it has no reason to support it, and that it works a denial of substantial justice. Instead of adopting such refinements of practice, I think it the policy of courts of justice to enlarge remedies, where possible, so that causes may be tried and heard on their merits, and not to make rules which serve no better purpose than to discipline unskilful practitioners at the expense of their clients.

STATE OF MISSOURI TO THE USE OF CHRIST VON DER AHE, Respondent, *v.* S.C. CABANNE ET AL., Appellant. 14 455 / 39 671

December 4, 1884.

1. EVIDENCE — MORTGAGES. — Oral evidence is admissible in aid of the descriptive terms employed in a chattel mortgage.

2. —— That property is technically misdescribed in a chattel mortgage is immaterial where the intention of parties that it should pass under the mortgage is clear.

Appeal from the St. Louis Circuit Court, Thayer, J. *Affirmed.*

R. W. Goode and M. W. Huff, for the appellants.

J. J. O'Neil, for the respondent.

Bakewell, J., delivered the opinion of the court.

This is an action upon an indemnifying bond given under the sheriff and marshal's act. The cause was tried without a jury. The court found for the plaintiff, and assessed the damages at $350.

The petition describes the property seized by the sheriff and belonging to the plaintiff as "one safe, two counters, shelving, show-cases, clock, wall case, desk, three chairs, five pictures, two ice boxes, one marble-top side-board, lot oil cloth, chandeliers and gas fixtures, lot glassware, partition, wash stand, mirrors, marble slab and fixtures, one door screen, lot counters, one window show-case, three signs, one gas cigar lighter, one tobacco cutter, one cigar cutter, one rubber foot mat, of the value of $400."

The claim of plaintiff filed with the sheriff, describes the property substantially, as set out above, states its value at $400, and that the plaintiff owns the same, under a chattel mortgage executed by the defendants in the attachment, dated September 21, 1882, and recorded next day.

The indemnifying bond describes the property attached and claimed, word for word, as it is described in the petition.

The mortgage is dated and duly recorded as set out above, and is made to secure a note of Hogan & Kelly (the defendants in the attachment in which the indemnifying bond was given), to Von der Ahe, for $600, at thirty days, dated the day of the mortgage. The mortgageors are Hogan & Kelly. The property is described as "per-

Digitized by Google

sonal property now in store in house southeast corner of Sixth and Pine Streets, in the city of St. Louis, 2 packages brandy, 1 sherry, 1 rye whiskey, 1 port, 3 dozen bottles whiskey, 1 case Rhine wine, 1 claret, 1 case eastern, 1 case Irish whiskey, 1 case port wine, 2 cases city club wine, 2 cases champagne, about 600 cigars, all the fixtures, worth about $625, about $75 tobacco."

The return of the sheriff to the attachment is that he seized "the following described personal property at store southeast corner of Sixth and Pine Streets, described as follows: A lot of cigars, cigarettes, pipes, tobacco, smoking and chewing, safe, counters, shelving, show-cases, wines, liquors, clock and miscellaneous articles," which he sold at the store aforesaid for $948.64. The advertisement attached to the report of sale describes the property as it is described in the sheriff's return.

The plaintiff testifies that he gave Hogan a check for $600 to release a levy on the property on Sixth and Pine Streets, and took the chattel mortgage as security; that there was still due him $350; and that the fixtures were worth $600. O'Neill, for the plaintiff, testified that all the articles mentioned in the mortgage were in the store when the mortgage was given, and that the property particularly described in the claim was in the store "when the mortgage was given, when they were levied upon by Cabanne, and when the claim was filed." This was all the evidence in the case. No instructions were asked or given.

It is evident that the mortgage was not written by one acquainted with the law of fixtures. The mortgage seems to have been upon property in a dram-shop. We think it was for the trier of the fact to say from the evidence whether "all the fixtures, worth $625," was not meant to express all the personal property in the shop, constituting its furniture at the time the mortgage was given.

When S and C entered into an agreement in writing by

Digitized by Google

which S agreed to sell to C his house, farm and premises, all the tools belonging to the saw mill, all the apparatus belonging to the grist mill, "together with all the fixtures belonging to the fulling mill and carding machine, together with every article attached to the freehold," it was proved that a building on the farm, which had been used in the wool-carding and cloth-dressing business, was called and known at the date of the contract as the fulling mill and carding machine; but the building had not been used for that business for years, and the carding machine itself had been taken from the building and stored in the grist mill. It was held that S intended to sell and C to purchase not only the fulling mill and carding machine building, but all the machinery on the farm, which had been used in such building as fixtures, and that such machinery was what they meant by the words "fixtures belonging to the fulling mill and carding machine;" that it was error to charge the jury that, if, before the contract, the carding business had been abandoned, and the carding machine removed, the machine having become personal property, did not pass by the contract; and that it should have been left to the jury to say, upon the evidence, whether the phrase "fixtures belonging to the fulling mill and carding machine," did not mean the machinery that had been detached from the building and stored elsewhere. *Martin* v. *Cope*, 28 N. Y. 180.

There can be no doubt that, where the inquiry is whether particular property was intended to be embraced in a written instrument, oral evidence is admissible to aid the descriptive terms employed. *The State ex rel.* v. *Cabanne*, *ante*, p. 294. It is in evidence in the present case that all the articles claimed were on the premises described in the mortgage when it was given; and it is a fair inference from the character of the property that it was the ordinary shelving, counters and furniture of a dram-shop, and that

Digitized by Google

all this furniture was meant to pass under the general term of "fixtures, worth $625."

As to the measure of damages, there is testimony tending to show that these articles were worth $600, and that $350 was still due the plaintiff on the mortgage.

As to the *bona fides* of the transaction between the defendants in the execution and the plaintiff, there was testimony tending to show that, at the time the note and mortgage were executed, the plaintiff gave to Hogan & Kelly his check for $600, which they indorsed to Cabanne, the plaintiff in the attachment proceedings, and which he indorsed. The check was put in evidence by the plaintiff; it was in his possession with these names on it, and no objection was made to its introduction. This check was given to release a levy on this same property, and the mortgage was given to secure this advance.

We think that there was substantial evidence to support the finding, and see no sufficient ground for reversing the judgment. It is therefore affirmed. All the judges concur.

ANTON MERZ, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

December 4, 1883.

1. **MUNICIPAL ORDINANCES — RAILROADS.** — A municipal requirement that all trains propelled by steam shall sound the bell and shall have a brakeman and a lookout thereon, is not void for unreasonableness.

2. —— That such a requirement applies to trains moving over grounds of the defendant, which are open to the public, does not involve any property rights nor exonerate the defendant from the duty of observing the regulation.

3. —— **POLICE POWER.** — The city of St. Louis may, under its charter, pass such an ordinance as a police regulation.

4. **RAILROADS — NEGLIGENCE — DAMAGES.** — A failure, in violation of municipal regulations, to keep a brakeman and a lookout on the train, which

Digitized by Google

contributes directly to the injury, may render the defendant liable, not withstanding the plaintiff's negligence in not looking for the train, if, by the observance of such regulation the accident could have been avoided.

5. — It is negligence for a railroad company to send its detached cars, without a brakeman, over its own grounds which are open to the public, in the city of St. Louis.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Affirmed.

E. A. ANDREWS, for the appellant.

FREDERICK GOTTSCHALK, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This is an action for damages by the father of a minor child, who was run over by one of the locomotives of defendant, thereby losing his arm. There was a verdict and judgment for the plaintiff for $1,703.

Another action by the boy himself for the damages occasioned to him by the same injury was appealed to this court, and the judgment affirmed at the last March term. 13 Mo. App. 589.

Counsel for appellant states in his brief that this case rests entirely upon different proof from that in the boy's own case. I have read the entire testimony in both cases, and I think that the testimony on behalf of plaintiff is so much the same in both, that the statement made by me in writing the former opinion might very well serve in this case. If the plaintiff's case was the same as before, it is quite immaterial for the purposes of this appeal that defendant may have strengthened his defence. The weight of the evidence was for the trial court; we are not concerned with that at all.

There was testimony tending to show that the accident happened on defendant's track in that part of St. Louis called Carondelet, in the block between Vine Street on the north and Stein Street on the south. A part of the ground

Digitized by Google

to the west of the railroad tracks is leased by defendant, and was being used as a quarry. Some men were quarrying there, for the lessee of defendant, at the time of the accident, and the son of plaintiff was engaged in hauling refuse from the quarry, to fill up around the railroad track. Two tracks ran north and south, to a switch somewhat north of Vine Street. The tracks were trestle work, but the ground had been filled up in most parts up to the ties, and in some places extended beyond the ties on the west. In other parts there was a sheer jump of several feet, if you wanted to leave the track. East of the track was an old building used by the quarrymen as a privy. The usual mode of reaching this privy was to get on the track, walk about thirty-five feet north, and go down. The privy could be reached by way of Stein Street, but that was a round-about way. The boy Joseph, who was a child of fourteen years at the time, left his cart at the west side of the track, and made his way to the privy, taking the nearest cut across the tracks. On his way back he passed under the eastern trestle work. As he approached the western track he saw a train of flat cars pass north. When it had passed, he got on the western track and walked south. He says he could not see from the center of the track to the switch. He listened and looked half round, but saw nothing. There was a high wind. He neither heard nor saw the cars until he was knocked down by them, after he had walked about twenty-two steps south on the track, and was within a step of reaching the point at which he could have left the track. He says he walked fast.

The locomotive which the boy had seen pass with flat cars, was engaged in "kicking" cars from one track to the other. The cars were run north to the switch. When they passed the switch, the brake was set in a manner that was calculated to stop cars in the middle of the block. The cars were then "kicked" by the locomotive, and ran south on the western track, with no one on them. The brake-

Digitized by Google

man and engineer at the switch saw the boy when the three flats were beyond their control, and they shouted; but they were at the switch, over 300 feet from the boy. He did not hear them. The cars passed over his arm and stopped at from twenty to twenty-five feet beyond the place where he was struck down.

Very full instructions as to negligence and contributory negligence were given, at the instance of the plaintiff and defendant. It is not necessary to set out or comment upon these instructions, since the appellant makes only two points in this court: 1st. That the court erred in admitting in evidence a certain municipal ordinance; and 2d, that the court erred in not sustaining defendant's demurrer to the evidence, because there was no evidence of negligence on the part of defendant, and the evidence of contributory negligence was such as to preclude a recovery.

1. The ordinance in question provides, that it shall not be lawful for any car or locomotive propelled by steam to run within the limits of the city of St. Louis at a speed exceeding six miles an hour; and that, when moving, the bell of the engine shall be constantly sounded within said limits; and, if any freight car, cars, or locomotives propelled by steam be backing within said limits, a man shall be stationed on the top of the car at the end of the train furthest from the engine to give danger signals; and no freight train shall, at any time, be moved within the city limits, without it be well manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals and hear the signals from the engines.

It is contended that the city of St. Louis had no power to pass this ordinance.

The city has, under its charter, express power to regulate the use of all streets within its limits (Charter, Art. III., sect. 26, subd. 2), and to regulate all vehicles, business, trades, and avocations. *Ib.* subd. 5. But it is well settled, both on principle and authority, that the municipal authori-

Digitized by Google

ties of large towns have the right to adopt such ordinances as the one cited, by the virtue of their general supervision over the police of their respective jurisdictions. *Whitson* v. *City*, 34 Ind. 396; *Neier* v. *Railroad Co.*, 12 Mo. App. 25; *B. & N. F. R. R.* v. *City*, 5 Hill (N. Y.), 209. "We should entertain no doubt," says Judge Redfield (2 Redf. on Rys., 578), "of the right of the municipal authorities of a city or large town to adopt such an ordinance" (*e.g.*, one prohibiting the propelling of cars through any part of the city by steam) "without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions."

It is contended that such an ordinance, if construed to apply to the right of defendants to run its cars and locomotives as it pleases over its private property, is unreasonable and unconstitutional, as depriving defendant of the use of its property, and taking its property without compensation and without process of law. We need not examine whether there might be anything in this view if the case were one of running trains over enclosed property belonging to defendant. We have already said in the case of Joseph Merz against this defendant, in regard to the same occurrence (13 Mo. App. 589), that, where a railway company lays down its track in a populous city, not within any enclosure, but on ground open to the public, the mere fact that the rails are not laid over a public highway, but upon private property of the company, ought not to be held to relieve the company of its obligation to observe all reasonable municipal regulations as to the movements of locomotives within the limits of the corporation. The ordinance, in terms, applies to all trains running within the city limits.

But all that has been addressed to us by counsel for appellants in this case, about private property and the right of a proprietor to use his own, seems to me entirely out of place, in view of the undisputed facts of this case. It would

Digitized by Google

seem to be the height of absurdity to hold that an imaginary line, a mere line upon a plat, not indicated by anything upon the ground, is to divide the ground upon which the corporation is bound to one degree of care from that on which it is bound to a less degree of care in moving its cars. Let it be granted that the company might send its cars from a point outside of its own property, at any rate of speed, without a brakeman, on to and over its private enclosure, it would not follow that it could do so on open ground free to the public. By license and by sufferance, the men working in the quarry were permitted to cross the track and at the point where the accident happened they were constantly doing so, and the track was open, besides, to the general public. The defendant was bound to exercise its rights, therefore, with a view to that use of its property which it had allowed, at least until it withdrew the permission; and, when they permitted cars to run without a brakeman over portions of the road thus used, the agents of the company were clearly guilty of negligence.

The language of Judge Agnew in *Kay* v. *Pennsylvania Railroad* (65 Pa. St. 274), is very apposite: "In the present case the railroad company, for the benefit of trade, resulting in its own profit, built its tracks along the road basin, and left its lot open for the convenient access of the public in the handling of lumber, and transferring it to the cars upon its tracks. And the lot being thus open to all engaged in that business, it also suffered its tracks to be used by the neighboring population as a way across the lot, from one part of the city to another. As a consequence, people passed and repassed upon the tracks, and the company and its servants would be led to expect to find them there at nearly all hours of the day. It is not like those portions of the road used solely for the passage of trains, where the company would not only have a right to demand, but reason to expect a clear track. But the presumption of a clear track at this place could not reasonably

Digitized by Google

arise, if the circumstances were such as have been stated. A greater precaution against injury to those permitted to use the lot and the tracks of the company, became a duty. Was it a proper and prudent use of the track to detach and send the unattended car forward in the manner stated? It seems to us it was negligence. Certainly, no prudent, reasonable, and honest-minded man could think it unattended with danger to persons liable thus to be found upon the track, to send a car out of sight, round a curve, on a down grade, uncontrolled and unattended by any one capable of checking it in case of danger. Its only purpose was to save a few hundred feet of travel to the engine by detaching it from the car when in motion, and stopping the engine before it reached the switch, in order to permit it to run forward on the main track to hitch on to the cars. To save this short time and distance, life was perilled, and a serious injury inflicted."

2. That plaintiff's son was guilty of negligence, is clear; but this fact was not necessarily fatal to plaintiff's case, because, if the negligence of the railroad company contributed directly to the injury, and occurred after the injured person might have been discovered on the track by defendant's servants in time to avert the accident by the use of proper care, the contributory negligence of the person injured will not serve to discharge the company from liability for the injury. *Kelly* v. *Railroad Co.*, 75 Mo. 138; *Eckert* v. *Railroad Co.*, 13 Mo. App. 352; *Merz* v. *Railroad Co.*, 13 Mo. App. 589.

But we need not go over this ground again. Nor is there any more evidence in this case, than there was in the former case in which the boy was plaintiff, that he was a trespasser. Trespass itself becomes right by sufferance and lapse of time. The boy was on the track, as the quarrymen with whom he was working were on the track, from time to time, and whenever they went to obey a call of nature; and, of this, the agents of the company had notice;

Digitized by Google

and it is not pretended that there was not at least a tacit consent on the part of the company to this use of the track by the persons working the quarry and dumping the refuse to fill up to the rails.

This case can not be distinguished from the former case between the boy and the defendant, to which we have referred. That case is decisive of this; and we see no reason to depart from anything decided or said in that opinion. Railroad companies, in the prosecution of their business, have no more right than have private citizens to run men down, or to impel dangerous machines through a city, with no one to control them, and in disregard of the lives and limbs of the citizens, even though by leaving the ponderous machine to follow the impulse it had received, without the possibility of the application of a timely check should a sudden danger intervene, the company may save a little time and a little money in the management of its affairs. And a trespasser, notwithstanding his trespass, may have redress for negligent injuries inflicted on him. *Injuria non excusat injuriam.* It is no defence to the reckless striking of a traveller by a locomotive, that he was loitering on the track. Where defendant has been guilty of a breach of public duty, which inflicts damage, he is not to excuse himself by the prior negligence of the person injured. Whart. Neg., sect. 348. The rule is well established, that though a person be injured whilst unlawfully on the railroad track, and contributes to the injury by his own want of care, yet, if the injury might have been avoided by the use of ordinary caution by the railroad company, the company is liable. *Brown* v. *Railroad Co.*, 50 Mo. 461.

Our attention is called to nothing in the record that can furnish any ground for disturbing the judgment; it will, therefore, be affirmed. All the judges concur.

Digitized by Google

CITY OF ST. LOUIS, Respondent, v. JOHN W. HERTHEL, Appellant.

December 4, 1883.

1. CONSTRUCTION OF STATUTES — GENERAL AND SPECIAL WORDS. — General words, in a city charter, preceded by particular words are to be held as applying to the persons or things of the same kind as those that precede.
2. —— RULE OF INTERPRETATION. — The subject-matter, the context, and the apparent intent of the legislature are to be considered in interpreting a statutory clause.
3. MUNICIPAL CORPORATIONS — CITY CHARTER — LICENSES — POLICE POWER. — A city charter which empowers the municipal legislature to "license, tax, and regulate lawyers, doctors, dentists, artists," and others enumerated, and which concludes with the words, "and all other trades, avocations, or professions whatever," empowers the city to impose a license tax upon architects, though they be not expressly named.
4. —— EJUSDEM GENERIS. — Architects, as members of a liberal profession, are *ejusdem generis* with lawyers, doctors, artists, and others of like professions.
5. CONSTRUCTION OF STATUTES. — The passage of a statute prohibiting the taxing of lawyers, doctors, and others enumerated, does not affect the right of the municipality to tax other professions not enumerated or included in the inhibition by general terms.

APPEAL from the St. Louis Court of Criminal Correction, NOONAN, J.

Affirmed.

KLEIN & FISSE, for the appellant: Architects are not named in the enumeration of pursuits which are subject to be licensed. Neither are they embraced within the general words following the particular enumeration; for it is uniformly held that wherever general words follow particular words of description, the general words do not enlarge the prior particular words, but are restricted in their application to classes similar to those particularly designated. — Sedgw. on Stat. Con. 423; Potter's Dwar. Stat. 236; *City of St. Louis* v. *Laughlin*, 49 Mo. 559; *Butler's Appeal*,

Digitized by Google

73 Pa. St. 458; *Drake* v. *Phillips*, 40 Ill. 388; *Wright* v. *Norwich, etc., Transfer Co.*, 8 Blatchf. 22.

Ashley Clover, for the respondent: An architect, whose profession is certainly a learned one, is a member of the same *genus*, is *ejusdem generis*, with a lawyer, doctor, etc., although in many respects there is no resemblance between the occupations. — *Butler's Appeal*, 73 Pa. St. 448; *Whitmore* v. *Bedford*, 5 M. & G. 13; *Regina* v. *Reid*, 28 Eng. L. & E. 133; *Woodworth* v. *The State*, 26 Ohio St. 196; *Foster* v. *Blount*, 18 Ala. 687; *United States* v. *Fisher*, 2 Cranch (U. S.), 358; *The State* v. *Williams*, 2 Strobh. (S. C.) 474; *The State* v. *Holman*, 3 McCord, 306.

Bakewell, J., delivered the opinion of the court.

The defendant was convicted of violation of Article 20, chapter 37, of the revised ordinances of St. Louis, in this, that he carried on the business of an architect in St. Louis without having obtained a license. On trial anew in the court of criminal correction, the case was submitted on an agreed statement of facts; and the defendant was again convicted.

The only question presented for our consideration is as to the validity of the ordinance, the first section of which is as follows: "It shall not be lawful for any person to exercise within this city the business of a money broker, advertising agent, architect, bill poster, claim agent, conveyancer, civil engineer and surveyor, engraver, lithographer, loan agent, mercantile agent, oculist and aurist, patent solicitor, photographer, sewing machine agent, veterinary surgeon, or keep a billiard table, nine or ten-pin alley, shuffle-board or bagatelle table, or to own, conduct, or manage for gain, a theater or other exhibition, show or amusement, without a license therefor."

It is contended by the appellant that, under the city charter, the municipal assembly has no authority to levy a tax upon the privilege of exercising the profession of an

Digitized by Google

architect. This is the only objection urged here against the conviction, and the only point that is presented for our consideration.

Under the charter, the mayor and assembly have power within the city, by ordinance not inconsistent with the constitution or any law of the State or of the charter (sect. 26, Art. III., subd. 5): "*Fifth.* To license, tax, and regulate lawyers, doctors, doctresses, undertakers, dentists, auctioneers, grocers, merchants, retailers, hotels, boarding houses, tenement houses, office buildings, public buildings, public halls, public grounds, photographists, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, financial agents and brokers, horse and cattle dealers, patent right dealers, inspectors and gaugers, stock-yard proprietors, examiners of titles, conveyancers, mercantile agents, insurance companies and insurance agents, bankers, banking or other banking corporations or institutions, telegraph companies or corporations, street railroad cars, livery and sale stables, hackney carriages, private carriages, barouches, buggies, wagons, omnibuses, carts, drays, and other vehicles, and all other business, trades, avocations, or professions whatever; to fix the rates for carriage of persons, and of wagonage, drayage, and cartage of property, and regulate the width of the tires of all vehicles for heavy transportation; to license, regulate, tax or suppress ordinaries, hawkers, peddlers, brokers, pawn-brokers, money changers, intelligence offices, public masquerade balls, street exhibitions, dance houses, fortune tellers, pistol galleries, lottery ticket dealers, corn doctors, lock, private and venereal hospitals, museums and menageries, equestrian performances, horoscopic views, lung testers, muscle developers, magnifying glasses, billiard tables, or any other table or instrument used for amusement; circuses, operatic, theatrical, and other exhibitions, shows, and amusements; saloons, beer houses, tippling houses, dram-

Digitized by Google

shops and gift enterprises; and to suppress prize fights, coon fighting, dog fights, chicken cock fights, gaming or gambling houses; and to suppress bawdy and disorderly houses, houses of ill-fame and assignation; to provide for and enforce the registration of all births, marriages, or deaths; to license, tax, regulate or suppress all occupations, professions and trades not heretofore enumerated, of whatever name and character."

It is agreed that the number of architects in St. Louis is about one hundred.

It was held in *City* v. *Laughlin* (49 Mo. 559), that the charter of St. Louis, of March 4, 1870, then in force, gave no power to the city to levy a tax upon attorneys at law. The language of that charter, under which the authority was claimed, was as follows: "The mayor and city council shall have power within the city, by ordinance not inconsistent with any law of this State, to license, tax, and regulate auctioneers, grocers, merchants, retailers, hotels, boarding houses, tenement houses, office buildings, public halls, public grounds, concerts, photographers, artists, agents, porters, runners, drummers, public lectures, public meetings and shows, real estate agents and brokers, horse and cattle dealers, beer houses, patent right dealers, inspectors and gaugers, stock-yard proprietors, examiners of titles, conveyancers, mercantile agents, insurance companies, banking or other corporations or institutions, street railroad cars, hackney carriages, omnibuses, carts, drays, and all other vehicles, and all other business, trades, avocations, and professions whatever.

The supreme court held, in the case just cited, that the profession of the law is not *ejusdem generis* with any of the trades and avocations specified in the section of the charter of 1870 which it was then considering and which we have just quoted, and that the avocation of an attorney at law, for that reason, was to be held not to be embraced in the

Digitized by Google

sweeping clause at the end of the section. This seems to be clear enough as to the charter of 1870. No one of the liberal or learned professions is named in the section before the supreme court in *The City* v. *Laughlin*. The avocation of an attorney at law is not *ejusdem generis* with that of a grocer, merchant, or retailer.

But the provision under consideration in the case at bar, differs materially from that before the supreme court in the case just cited. The new charter, now under consideration, before the general clause at the end of the section, names, specially, several of the learned and liberal professions.

The rule of interpretation in such case is that, when particular words are followed by general words, the latter are to be held as applying to persons and things of the same kind as those that precede. That is, in the construction of statutes as well as of private instruments, general words are restricted in their meaning by the subject-matter, the context, and the apparent intent; and in any enumeration of particulars followed by general terms, the latter are to be restricted to cases *ejusdem generis*. 30 Vt. 746.

We are not to enlarge the letter of the charter before us by an equitable construction, as in the case of a remedial statute; but we are to construe it according to the intent of the framers; and that intent must be gathered from the language and object of the instrument, giving to that language an interpretation neither strict nor strained.

The words "all other business, trades, avocations, or professions whatever," must not be wholly rejected. The maxim "*expressio unius est exclusio alterius*," is not to be so applied that the city is to be held powerless to tax any calling not expressly named in its charter by its proper name.

We think that architects are, for the purposes of con-

Digitized by Google

struction here, to be held as *ejusdem generis* with lawyers, doctors, dentists, and artists, as exercising a profession of a technical character, for the useful exercise of which, long and careful study, as well as some special experience, is required. Lawyers and doctors belong to the learned professions, strictly speaking; perhaps dentists, artists, and architects do not; but, nevertheless, neither the one profession nor the other is purely mechanical; and lawyers, doctors, architects, and artists are all classed together as belonging to the liberal professions, and are all *ejusdem generis* in that respect. It may be said that ministers of the gospel and officers of the army and navy are all members of liberal professions, and yet could not be considered as *ejusdem generis*, within the scope of the ordinance. This is undoubtedly the case; but it is quite obvious that men can not be said to practice the business or avocation of soldier or sailor within a city, and that the avocation of a minister of the gospel has no place amongst secular professions.

The legislature did not intend by the charter to prohibit the city from taxing any business, trade, avocation, or profession not expressly named in the charter; and we have no doubt that it did intend to give the city the same right to tax architects as it has expressly given it to tax doctors and lawyers. No reason appears why the one profession should be subject to taxation and the other be exempt.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

BAKEWELL, J., delivered the opinion of the court on motion for a rehearing.

Counsel for the appellant move for a rehearing, and, in that motion, now for the first time, call our attention to the act of the general assembly of March 6, 1879, entitled "An

Digitized by Google

act to prevent the licensing or taxing by municipal corporations of certain professions."

The provision reads as follows: "Hereafter, no person following for a livelihood the profession or calling of minister of the gospel, teacher, professor in a college, priest, lawyer, or doctor of medicine, in this State, shall be taxed or made liable to pay any municipal or other corporation in the state, any tax or license of any description whatever, for the privilege of following or carrying on such profession or calling, any law, ordinance, or charter to the contrary notwithstanding." Acts 1879, p. 45.

The provision of the charter under construction took effect at the end of sixty days from its ratification on August 22, 1876. According to the principle of construction applicable to the language of that charter, the city had the power, as we hold, under its provisions, to tax the privilege of exercising the profession of an architect. The law which we have cited above does not deprive the city of the power to tax architects which it already had. The law of 1879 uses no general terms, but expressly names the callings which no municipal corporation shall tax. It neither says nor implies that architects are not to be taxed. If, then, they were taxable by virtue of the charter of 1876, on the day that charter went into effect, they are taxable now, for anything shown to us.

We have nothing to say in answer to so much of the brief of learned counsel for the appellant as is mere reargument of the question argued and submitted and disposed of, so far as this court is concerned, in the opinion filed.

The motion for a rehearing is overruled. All the judges concur.

Digitized by Google

14 474 | 55 276 | 14 474 | 62 430

WILLIAM SKRAINKA ET AL., Appellants, *v.* AUGUSTUS OERTEL ET AL., Respondents.

December 18, 1883.

1. EQUITY — INJUNCTION. — A writ of injunction will not be issued where the result would be oppressive upon the defendant, or where the plaintiff by reason of his own acts, ought not, in good conscience, to ask it.
2. STREETS. — To constitute a public street, there must be a public user or, an acceptance in some manner by the city.
3. EASEMENT — RIGHT OF WAY. — An easement of right of way can not be claimed over land which, for twenty-five years, has been used, with the claimant's knowledge and co-operation, as a stone quarry, over which there was no way.
4. INJUNCTION — DAMAGES. — Actual loss of time to the defendant in procuring a dissolution of the temporary injunction is an element of damages recoverable on the bond.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

R. E. ROMBAUER, for the appellants: Injunction will lie to restrain an interference with a right of way.— *London M. W. R. R.* v. *Lancashire & Y. R. R. Co.*, 4 Eq. 178; *Goodson* v. *Richardson*, 9 Ch. 221; *Allen* v. *Martin*, 20 Eq. 465; *Ardley* v. *Guardians of St. Pancras*, 39 L. I. 871. The remedy must be sought while the work is unfinished, because when it has been once completed the party must resort to an action of damages.— *Fanors* v. *Van Littart*, 1 Ra. Ca. 602; *Drere* v. *Guest*, 1 M. & C. 516; *Moreland* v. *Richardson*, 22 Beav. 604; *Camochan* v. *Norwich, S. R. Co.*, 26 Beav. 171; *Doran* v. *Carroll*, 11 Ired. Ch. 379. The only counsel fees recoverable in any event are those necessarily incurred to secure a dissolution of the injunction already granted.— *Bostmantel* v. *Stewart*, 55 Cal. 115; *Steele* v. *Thatcher*, 56 Ill. 257; *Hovey* v. *Rubber Tip Co.*, 12 Abb. Pr. (N. S.) 360.

Digitized by Google

Time lost in consultation with counsel are not proximate damages.— *Center* v. *Hoag*, 52 Vt. 401; *Lange* v. *Wagner*, 52 Md. 310; *Campbell* v. *Metcalf*, 1 Mont. Ty. 379; *Brown* v. *Jones*, 5 Nev. 374. Nor can any damages be recovered resulting from the fact that defendants were enjoined from committing a trespass — *Jenkins et al.* v. *Parkhill*, 25 Ind. 473, 479.

T. J. CORNELIUS, for the respondents: "An injunction should only be granted when the rights sought to be protected are clear, or at least free from reasonable doubt." — Willard's Eq. Jur. (Potter's ed.) 342; Hill. on Inj. (3d ed.) 19; Washb. on Ease. (3d ed.) 700. "He who seeks the interference of a court of equity must not come with unclean hands." — *Casseday* v. *Metcalf*, 1 Mo. App. 593. An injunction is not issued by a court of equity as a matter of right, but as a matter of grace. And "no injunction will be granted when it will operate oppressively, inequitably, or contrary to the real justice of the case." — Hill on Inj. (3d ed.) 33; 2 Story's Eq. Jur. (11th ed.), sect. 959, p. 169. An adverse user of the grounds subject to the easement for the period of limitation destroys the easement — Washb. on Ease. (3d. ed.) 672. One can not claim a right, the enjoyment of which he has rendered impossible by his own act. — *Taylor* v. *Hampton*, 4 McCord, 96.

BAKEWELL, J., delivered the opinion of the court

This is an application for an injunction. The plaintiffs allege that they own a lot in city block 237, bounded west by Commercial Street; that Commercial Street runs east and west through the block, and is not a public way, but a private easement essential to the convenient use of plaintiff's property; that defendants, from April, 1882, to the filing of the bill on the 9th of May, 1882, have quarried into Commercial Street south of and adjoining plaintiffs' property; that this is an irreparable

Digitized by Google

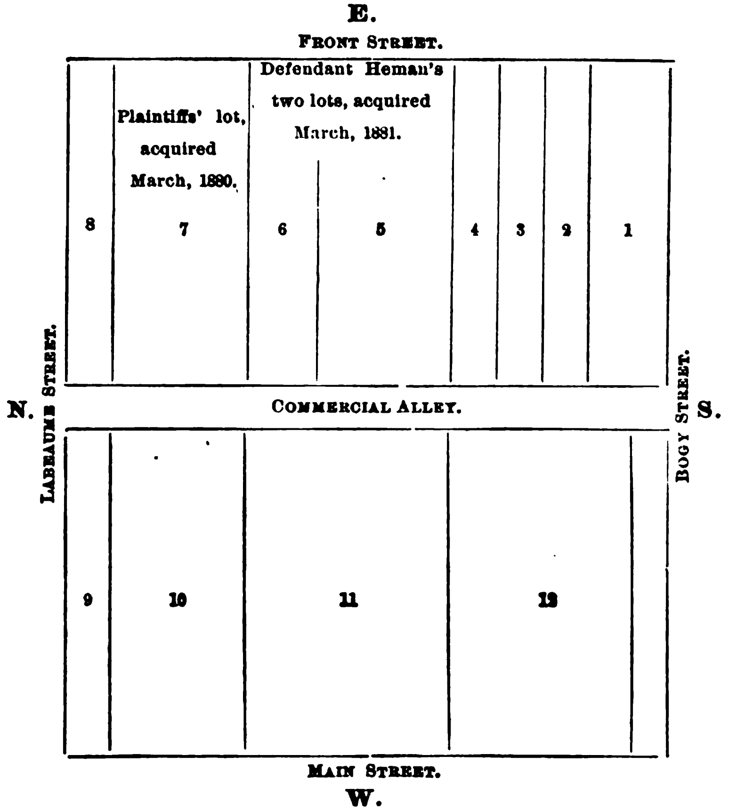
injury to plaintiffs, and endangers and destroys their easement, etc.

The defendants file separate answers. They deny that a private way ever existed over Commercial Street, in block 237, or that their acts interfered with plaintiffs' rights. They aver that Commercial Street in said block has been abandoned as a way of street for twenty years, during which period plaintiffs and the property holders in the block quarried in Commercial Street until it is an almost exhausted quarry. They say that, by reason of these acts of plaintiffs and others, and the representation of plaintiffs, defendant Heman was induced to believe that all rights of way over Commercial Street were abandoned, and, so believing, he bought land in block 237, and expended large sums in preparing to quarry on his said land and on Commercial Street. Oertel alleges that, in 1877, he owned a strip of ground lying between the lot of plaintiff and Labeaume Street, and became a partner of plaintiff as quarrymen; and that plaintiffs and he then agreed that Commercial Street had been abandoned more than ten years, and they quarried out all the rock on Commercial Street from Labeaume Street south to Heman's lot, so that plaintiffs, when they subsequently bought their lot described in the petition, knew that there was no way over Commercial Street. Heman further states that he had a license from all owners in the block, except plaintiff, to quarry out Commercial Street, the value of which, owing to his investments in quarry property made with knowledge of plaintiffs, is $10,000. He also alleges that the former owners of the block, by their recorded partition, deed, and plot, laid out Commercial Street through the block, and that the property so marked as a street has never been assessed for taxes. A temporary injunction was granted, which was dissolved on motion when the cause was heard on its merits. The witnesses agree as to the material facts, which are as follows: —

Block 237 was owned in 1857 by Bogy, Page, and Benoist,

Digitized by Google

who then made partition by deed and plat duly recorded. The plat in the partition is set out below, in order to the better understanding of this statement.



Labeaume Street is not used as a street, but is occupied as private property. Bogy and Main Streets are macadamized streets. Front street is occupied by tracks of the K. C., N. & W. railroad and of the St. Louis Transfer Company, from the eastern line of the block to the river. The property north of lot 7, including that marked as Labeaume Street, is in possession of plaintiff. Lot 8 is owned and used by plaintiffs, and they have a lease of the

Digitized by Google

land marked Labeaume Street. Over lot 8 and the property marked Labeaume Street they have, by virtue of their present possession under lease, a way to Main Street. For the purpose of showing that the property marked Front Street is private ground plaintiff introduced a deed from Barnes and wife to Mitchell and Tansey, who are trustees of the Transfer Company, for lots 1, 2 and 3, of block 237, and the land on Front Street lying between those three lots and the river. Plaintiffs acquired lot 7 by deed dated 29th of March, 1880. It is described as bounded west by Commercial Street, and east by proposed Front Street. All the mesne conveyances from Bogy, to whom the land was assigned in partition, to plaintiffs' grantor, bound lot 7 west by Commercial Street. Heman acquired lots 5 and 6 in March, 1881, a year after the date of plaintiffs' deed. On the next day he reconveyed them to Mitchell and Tansey to hold after September 1, 1884, Heman to fill up to the grade such parts as he might quarry out, and Mitchell and Tansey to have the sole right to lay railroad tracks on the lots. It was admitted that defendants had begun to quarry, and, unless restrained, would quarry Commercial Street for a depth of fifty feet. The testimony shows that Commercial Street has been quarried by different persons from time to time since 1857, and during that time was not fit for travel, and has never been used as a thoroughfare, though it might be crossed at different points, the old quarries being from time to time filled up. There is now a gully twelve feet deep across the street in this block. Oertel testified that he bought ground in block 237, and quarried on lots 8, 9 and 10. In 1877 he formed a partnership with plaintiffs, to whom he sold a two-thirds interest in this quarry, which extended across Commercial Street. Heman had gone over his line only a foot or two on Commercial Street, but plaintiffs have quarried to a depth of sixty-three feet below Heman's lot. Heman testified that plaintiffs were quarrying right on Commercial Street in the

Digitized by Google

July and August of 1881; and that plaintiff Veiths told defendants that it was a public highway; that they had no right to quarry it, but that he alone had such right; that he had it pretty near out himself; and told every one else that it was a public highway on which they had no right to quarry.

1. The trial court dissolved the injunction, and we think that, upon the evidence, this was right. Plaintiff Veiths himself testified that it was impossible to go south on Commercial Street beyond the quarry which plaintiffs themselves had made there. Whether the street was a public street or a private way, plaintiffs made out no case for equitable relief. As to their easement of a right of way, the evidence is, that, for nearly three times the period of statutory limitation, the so-called Commercial Street has been notoriously used merely for stone quarries and dumping ground. Plaintiffs not only have had notice of this, but have contributed themselves to a use of the property that makes any right of way useless to anybody. Having themselves effectually obstructed the passage, plaintiffs have destroyed any right of way in themselves, if they ever had any. *Taylor* v. *Hampton*, 4 McCord, 96.

But if this is to be looked upon as a proceeding by one specially injured, to abate a public nuisance, then it ought to fail. The petition does not allege that Commercial Street, through block 327, is or ever was a public street. It does allege that it is not a public street. There can be no purpresture if this strip called Commercial Street is not a part of the public domain; and, were the allegations sufficiently made in the petition, the alleged purpresture must clearly appear in fact; and if it be doubtful whether there be a purpresture the relief should be withheld. *Attorney-General* v. *Railroad Co.*, 12 N. J. Eq. 1; *City* v. *Curtiss*, Clark (N. Y. Eq.) 339. In all cases of doubtful right, or remote or contingent injury, a court of chancery will wait for the right to be settled at law, or the injury to become imminent,

Digitized by Google

before it will interfere by the extraordinary process of injunction; and though, in case of direct, continuing, and permanent nuisance, equity will not compel plaintiff to resort to repeated actions at law, but will enjoin the nuisance (*Hayden* v. *Tucker*, 37 Mo. 214), yet the case must be one in which the existence of a nuisance is not doubtful.

Now, there seems to be no evidence that defendants are encroaching upon any public street. It is not enough that it appears that Commercial Street was dedicated as a street through block 327 by the owner. Labeaume Street, so far as the plat shows, is dedicated by the Benoist partition as well as Commercial Street; yet one of the grounds on which plaintiffs seek relief is that Labeaume Street is not a public street, but private property. An owner of land in the city limits does not make it a public street by mere dedication to public use. The city, we apprehend, must accept, or there must be a user by the public for the purpose of the dedication. A formal acceptance may not be necessary; but in the present case there is absolutely nothing to show any acceptance or use of Commercial Street through block 327 as a street, nor even that it corresponds with and continues the line of any city street, whilst there is evidence tending to show that from the time of the alleged dedication in the Benoist partition this pretended street has never been used as a street, but rather as a stone quarry. *Rector* v. *Hartt*, 8 Mo. 457; *Rose* v. *City*, 49 Mo. 510; *Taylor* v. *City*, 14 Mo. 20.

If Commercial Street were a public street, and their case was otherwise made out, plaintiffs might be entitled to an injunction on the ground that the injury threatened and complained of affects them in a special manner as property holders in the block. But they have themselves contributed to and set the example of the nuisance they are now seeking to abate. They themselves have obstructed, and are now obstructing, the natural outlet to Bogy Street. Nor does it appear that there is any immediate danger of irreparable

Digitized by Google

injury. Plaintiffs have access on their own land, and on land leased by them; that is, over lot 8 and Labeaume Street, to Main Street, and over lots 10 and 11; they can also reach Main Street if they can cross Commercial Street, and if they can not cross Commercial Street, between lots 7 and 10, it is on account of the hole that they themselves have dug there.

We do not think that the circuit court, upon the evidence, was bound to maintain in force the restraining order in favor of plaintiffs, who themselves destroyed the pretended street as a way for all owners of property fronting on it, including themselves, and who have acquiesced for many years, and so long as such acquiescence furthered their private interests, in a use of the land now said by them to be a public street or a private way, for purposes utterly inconsistent with its use as a street or way.

We do not think that the statutory provision first introduced in 1865 (Rev. Stats., sect. 2722), that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy can not be afforded by an action for damages," makes it obligatory upon the circuit court to issue the writ under circumstances where a chancellor might have properly refused it before the statutory provision. Its effect, perhaps, has been to lead the court to look with more favor upon preventive proceedings; but the writ ought not to issue where it will work oppressively, or where the plaintiff by his own acts has put himself in a position that he ought not to ask it, as where he would enjoin the defendant from continuing a quarry on a public street, or on land over which plaintiff claims an easement of right of way, which quarry defendant opened in good faith, induced in a great measure to do so by the fact that plaintiff at the time was, and for years be-

Digitized by Google

fore had been, quarrying in the middle of the same pretended street and in the same block.

2. On the motion for assessment of damages, a jury was waived, and the finding and judgment were for $410, of which sum the court allowed $300 for counsel fees, $100 for time lost by defendants, and $10 for expenses of deeds. The court declared the law to be, that no counsel fees can be recovered as damages beyond the reasonable value of services necessary to obtain a dissolution of the injunction, and that testimony as to the value of services in resisting the original application, and of all other services, must be disregarded. The court had admitted, against the objection of plaintiffs, testimony that the reasonable value of all the services of counsel for defendant in the case was $500, which included services for resisting the original application. Plaintiffs introduced testimony tending to show that the reasonable value of the services of counsel in obtaining the dissolution was not over $250.

We see nothing in all this that calls for our interference. The court could probably judge as well as the witness what the services were worth, and it did not consider, in arriving at their value, any illegal testimony, as appears from the declaration of law. It may be, that it was difficult to present the testimony as to the value of the services of counsel without making a lumping estimate, from which the court could determine what the particular services for which plaintiffs are liable were fairly worth. The charge does not seem to be at all exorbitant; and we think there was some evidence to support the finding in this respect. We think that any actual loss of time necessarily occasioned to defendants by the proceedings, was loss and injury sustained by defendants within the meaning of the statute. It appears that there was testimony that, in consultation with counsel and collecting necessary testimony to procure a dissolution of the injunction, defendants lost time exceeding $100 in value.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

Digitized by Google

14 483
87 117

AUGUSTA WINE COMPANY, Respondent, v. JOHN WEIPPERT, Appellant.

December 18, 1883.

1. PARTNERSHIP — NEGOTIABLE PAPER. — A note executed by one partner, in the firm name, for property likely to be used in the co-partnership business, will bind the firm, in the absence of the payee's knowledge at the time that it was made for the benefit of the member of the firm who executed it.

2. PRACTICE — EVIDENCE. — Evidence, taken at a former trial of the cause, of a witness who has since absconded, and whose address, by diligent search can not be found, may be admitted at a subsequent trial.

3. —— Objections to evidence which are not specifically made at the trial will not be considered on appeal.

APPEAL from the St. Louis Circuit Court, ADAMS, J. *Affirmed.*

F. GOTTSCHALK, for the appellant: Evidence of the testimony of a witness before the justice is inadmissible on trial anew in the circuit court. — Phil. Ev., 215; 2 Starkie Ev. 894; *Wilber* v. *Selden*, 6 Cow. 162; *Bergen* v. *The People*, 17 Ill. 426. This firm was not a trading firm; the paper involved here, is not a negotiable instrument, and is still in the hands of the original payee. And therefore the limitations of the common law of the power of a partner apply to and govern this case. — Story on Part. (7th ed.), sects. 111 and 112; Parsons on Part. 175; *Cadwallader* v. *Kroesen*, 22 Md. 204.

H. G. SACHLEBEN and E. J. O'BRIEN for the respondent: A promissory note given by one partner in the name of the firm is binding *prima facie* upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. But, it devolves

Digitized by Google

upon the partners, in order to escape liability, to show these facts. — *Hickman* v. *Kunkle*, 27 Mo. 401; Dan. on Neg. Inst., sect. 357; *Bank* v. *Snyder*, 10 Mo. App. 215. Where testimony is given under oath in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally entitled so to do. The same is admissible when the witness, though not dead, is out of the jurisdiction, or can not be found after diligent search, etc. Parol evidence of what he testified *viva voce* may be given. 1 Greenl. Ev. 163; *Franklin* v. *Gumersell*, 11 Mo. App. 314; *Cady* v. *Kyle*, 47 Mo. 346.

BAKEWELL, J., delivered the opinion of the court.

This was an action begun before a justice of the peace upon the following promissory note: —

"ST. LOUIS, MO., Dec. 31st, 1881. — Due, after four months from this date, to Augusta Wine Co., Augusta, Missouri, the sum of two hundred thirty-five dollars for value received. JOHN WEIPPERT & MUELLER."

On trial anew in the circuit court, a jury was waived, and the cause being tried by the court, there was a finding and judgment for plaintiff. No declarations of law were given by the court, nor were any such declarations asked.

The undisputed testimony is, that defendant Weippert and one George C. Mueller, were engaged together in business in St. Louis as co-partners, under the firm name of John Weippert & Mueller; and that the note was signed by Mueller, in the firm name, for wine purchased by him of plaintiffs, in the name of the firm; and was accepted by plaintiffs, in good faith, under the belief that the wine was purchased by, and received by, the firm.

There was also testimony on behalf of plaintiff tending to show that Weippert and Mueller were co-partners in the wine business. The only conflict of evidence was as to this, there being also testimony tending to show that Weip-

Digitized by Google

pert and Mueller were co-partners only in the business of manufacturing cider and vinegar, and that the wine business was carried on by Mueller on his own behalf. It is undisputed, however, that the entire business was carried on at the same establishment, and there was testimony tending to show that vinegar is made from such wine as that for which the note in suit was given, and that such wine, worth sixty-five cents a gallon, when made into vinegar, sells at a dollar a gallon. Defendant Weippert testified that he himself had made vinegar from wine.

1. There can be no question that this evidence warranted a finding for the plaintiff. The note given in the name of a firm for a commodity which might be used in the business of the partnership, would bind the firm, unless it appeared that it was known to plaintiff at the time that it was really given for the indebtedness of an individual member of the firm, or for a matter wholly foreign to the ordinary and legitimate business of the co-partnership. There was evidence tending to show that the execution of the note sued on was within what all persons trading with the firm, in the absence of express notice to the contrary, would necessarily consider to be the ordinary scope of the co-partnership.

2. It is objected that Tieman, the secretary of plaintiff, was improperly allowed to testify that plaintiff sold and consigned wine to defendants in their firm name, and never otherwise, from time to time in 1882, and had purchased bottles and transacted discounts with the firm, and had no notice of a different state of affairs, until witness called to collect the note. This witness also testified as to conversation with defendant Weippert, in which he said that everything was all right, and as to letters signed by the firm name, received by plaintiff, complaining of the qualities of certain wines received by the firm from plaintiff. The objection to all this evidence was made at the trial by a motion to strike it all out as hearsay. The court properly refused

Digitized by Google

to strike out the entire testimony of the witness, and there is nothing from which either the trial court or this court can see what particular statements of the witness were regarded as incompetent. Most of the testimony of this witness was clearly not hearsay; whether it was objectionable on other grounds, we need not now consider.

3. One who was present at the trial before the justice, was permitted to testify as to what was the evidence given at that trial by George C. Mueller, who was one of the original defendants. It appeared that all diligence had been used to procure the testimony of Mueller; that he has absconded and left the State, and is supposed to be in Colorado; but his residence could not be ascertained after diligent inquiry, and it was not possible to take his deposition. Where a witness is beyond the jurisdiction, and after every effort has been exhausted, it is found impossible to take his deposition, it is within the sound discretion of the trial judge to admit testimony as to his evidence at a future trial of the same case. *Franklin* v. *Gumersell*, 11 Mo. App. 306; *Shearer* v. *Harber*, 36 Ind. 536, 541; *Clinton* v. *Estes*, 20 Ark. 216, 235; 1 Greenl. Ev., sect. 163. In the present case, if the statements as to the former testimony of Mueller are excluded, plaintiff's case is so clearly made out *aliunde*, that we should not reverse the judgment, even if we regarded this testimony as incompetent.

The judgment is affirmed. All the judges concur.

---

14 486
e96 [1]615

ANTOINE SOURSIN, Appellant, *v.* THEODORE SALORGNE, Respondent.

December 18, 1883.

1. MASTER AND SERVANT — CONTRACT OF HIRING — BAR TO ACTIONS. — A recovery by a servant for a breach of a contract of hiring, in an action brought before the termination of the period for which he was hired, is a bar to a subsequent action for a breach of the same contract.

Digitized by Google

2. —— DAMAGES. — In an action so brought after a wrongful discharge of the servant, the recovery is for damages and not for wages for constructive service.

3. —— A servant can not, after his discharge, treat the contract as still subsisting, remain in voluntary idleness, and recover for constructive service.

APPEAL from the St. Louis Circuit Court, LUBKE, J

Affirmed.

KRUM & JONAS, for the appellant.

DYER, LEE & ELLIS, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was an action begun on the 18th of May, 1883.

Plaintiff alleges in his petition that he is a mechanic, skilled in the manufacturing and repairing of carriages, and that defendant was a carriage-maker, and on the 3d of March, 1882, engaged plaintiff as foreman and superintendent for a period of five years, at the rate of $35 a week, payable weekly; that plaintiff entered the service of the defendant under this agreement, and with proper skill, performed the duties of his employment, so that there became due to him from defendant for his services and wages, for the week ending October 28, 1882, $35; the petition thus contains the same allegation for every week up to the May 12, 1883, and asks judgment for these several sums.

The answer sets out the contract between plaintiff and defendant, which is in writing, and is substantially as alleged, and says that plaintiff has been paid in full for all the time that he rendered service; that on October 21, 1882, plaintiff left defendant's service; and that, on the 9th of November, 1882, plaintiff sued on said contract for a breach thereof, and obtained judgment before a justice against defendant for $70 for his salary under said contract for two weeks following October 21, 1882, the date

Digitized by Google

at which plaintiff claimed that, according to the claim of plaintiff, he had been wrongfully discharged, which judgment was paid by defendant.

The testimony in the case showed the contract as alleged in the pleadings, and tended to show a wrongful discharge on October 21, 1882, and a recovery by plaintiff, as alleged in the answer, for two weeks' wages after that date. There was also testimony tending to show that plaintiff was at all times competent and ready to perform his duties under the contract, and that he offered to do so, from the date of his discharge to the last date for which he claims wages in this action, and that he made unsuccessful efforts to obtain other employment.

The cause was tried without a jury. The court refused a declaration of law to the effect that on the facts stated above, plaintiff is entitled to recover; and also refused to declare the law to be that the judgment above mentioned was not a bar to plaintiff's recovery. And there was a finding and judgment for defendant.

A servant unlawfully discharged, may treat the contract as rescinded and sue on a *quantum meruit* for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damage from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit. A person discharged from services can not, strictly speaking, recover wages for a constructive service. If he brings such an action and recover, it must be regarded as an action for the breach of contract in wrongfully discharging him. As is said in *Colburn* v. *Woodworth* (31 Barb. 381), if the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it his folly or his misfortune. He can not sever

Digitized by Google

them and recover part in one action and the residue, when discovered, in another. The case of *Booge* v. *Railroad Co.* (33 Mo. 212), seems to be quite in point, and is decisive against plaintiff's right to recover on the testimony in the present case. The whole doctrine on the subject is discussed in *Howard* v. *Daly* (61 N. Y.), to which we are referred by counsel for respondent. In this last cited case, *Booge* v. *Railroad Co.* is classed with some few cases criticised and disapproved by the New York court as holding that a discharged servant may recover wages as for a constructive service. We do not think, however, that the Missouri case ought to be so classed. On the contrary, the supreme court, in the Booge case, says that there can be no recovery by a servant unjustly discharged as for services performed under the contract, but that the action must be for a breach of contract, or else on a *quantum meruit* for work actually performed, the contract being treated as rescinded. To recover for constructive service after his discharge it would seem that the servant must remain in voluntary idleness, which the law does not encourage. However that may be, there can be no question that the rule established in Missouri is that, if a servant wrongfully discharged elects to sue for the breach before the termination of the period of hiring, and recovers, this is a bar to further action, and that an action for wages accruing after the discharge, if there has been a recovery, must be regarded as an action for damages for the breach of contract. It is, of course, only on the theory that defendant had violated the contract on his part, that plaintiff could seek to recover wages for services after his discharge which he admits that he never rendered.

The judgment is affirmed. All the judges concur.

Digitized by Google

MICHAEL CARROLL, Respondent, *v.* PEOPLE'S RAILWAY COMPANY, Appellant.

December 18, 1883.

1. AGENCY — CORPORATIONS — NOTICE. — Knowledge possessed by the secretary of a corporation touching his business and coming within the scope of his duties, as such secretary, is the corporation's knowledge.
2. —— That such secretary, for his private gain, and without collusion with, or the knowledge of, the person dealing with him, fails to impart his knowledge to the corporation, is immaterial in an action against the corporation.
3. —— A car conductor who, in leaving a part of his wages with the secretary of a corporation as a deposit, believes that he is depositing the same with the corporation, being partly induced to this belief by the action of the secretary in making a memorandum of the deposit in writing, at the time, on the books of the corporation, and by other circumstances, may recover from the corporation the money so deposited.
4. —— ESTOPPEL. — The conductor's receipt on the books of the company for the full amount of his wages for each month will not estop him from recovering of the corporation the money so deposited with it.
5. —— Where one of two persons must suffer by the act of a third person, the loss must fall upon him who placed it in the power of the third person to do the wrong.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

GIVEN CAMPBELL, for the appellant.

MCKEIGHAN & JONES, with E. J. O'BRIEN, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The petition states that in May, 1880, the plaintiff was employed as a car conductor, at the wages of $2 per day, said wages being payable on the third and eighteenth days of each month; that he served the defendant as such, at said rate of wages, continuously to July 29, 1882, when he was discharged by the defendant; that from time to time during said period he requested the

Digitized by Google

defendant to retain and keep for him certain portions of his wages until he demanded them; that the defendant did so at various times, and in various amounts, amounting in all to $491, which the defendant promised to pay the plaintiff on demand, but has failed to do so; and he asks judgment for that sum and interest.

The answer of the defendant was a general denial.

At the trial, Michael Carroll, sworn for himself, said that he entered the service of the company, as conductor, about April 1, 1880, at the rate of wages of $2 per day, and remained in its service to about July 11, 1882. "William B. Ryder was secretary and treasurer of the company. There were two regular pay-days each month, the third and eighteenth of the month. The first transaction was when I first commenced. I paid for a book and some tickets and had $10 left, which I told Mr. Ryder that I would like to leave in the office, so that I could draw it, and afterwards I drew it in tickets. The first proceeding of this money-leaving was about the first of June. I said to Mr. Ryder that, if I continued, I wanted that he should have this money entered on the book according as I left it in, so that any time I would go in there to draw this money, whether voluntarily or otherwise, it could be settled up from this book (the pay-roll book), and Ryder agreed to it. Under this understanding I continued on to do so, believing that I was leaving the money in the hands of the company, and the amount so left was in the aggregate of $491. The part I didn't draw I never saw it; it was not handed to me and by me handed back. It was understood between me and Ryder that he would enter it on the book where it would show, and I saw him mark it on the book. I did not know whether Ryder was personally responsible, and had no conversation with him about this money outside of the office. I signed the pay-rolls for the amount due me set opposite my name."

Digitized by Google

On behalf of the defendant, W. B. Ryder testified that, from April, 1880, to June 3, 1882, he was secretary and treasurer, and had charge of the books of the defendant. "It was an universal rule of the company that the employés were to be paid on the third and eighteenth of each month, and all had notice of it, and they were required to go up and sign the pay-rolls on those days. It has been the custom for the last twenty-three years, as was done in this case, for the men to come up and sign the pay-roll and leave a part of the money with me as an individual. [It was admitted by counsel for the plaintiff that the plaintiff signed the pay-roll in full for all wages.] All that the plaintiff would say was, 'I want to leave $20 in,' or some other amount, and would say, 'Give me the difference;' he never told me that he wanted the defendant to retain and keep a certain portion of his wages. I always paid him off; he knew the regular pay-days, and that the employés were required to come up on those days and be paid off; that such was the practice of the company. He merely asked me to retain the money and keep it for him. He came to me after I left the employment of the company, and wanted to know when I could pay him; how soon I could do it. The entries on the pay-roll of the amounts left in were in pencil; and I kept a memorandum of these amounts in a book of my own. I do not know that the company ever had knowledge that the men were leaving money with me. I never informed the plaintiff that I had any authority from the company to retain any part of his wages for the company; he never asked me."

Julius S. Walsh was president of the defendant corporation. He testified that it was the practice of the company to pay its employés twice a month, and all employés were required to draw their wages then. "The plaintiff never asked the company, to my knowledge, to retain and keep any part of his wages, and the company never promised to pay him any of these amounts. The company

Digitized by Google

was not aware of these transactions with Mr. Ryder until he resigned. I had charge of running the road; Ryder of the books and office."

The plaintiff, recalled, said he never demanded his money of Ryder; Ryder never gave him money which he gave back. This was all the evidence.

At the close of the plaintiff's case, the defendant offered an instruction that, under the pleadings and evidence the plaintiff could not recover, which the court refused to give. The court then gave the following instruction at the request of the plaintiff: "The court instructs the jury that, although they may find that plaintiff Carroll signed a receipt on the pay-roll of the defendant for the full amount of wages agreed to be paid him by the defendant, yet if the jury find from the evidence that Carroll, as a matter of fact, did not draw all his wages, but left from time to time a part thereof with the defendant, they will find their verdict for plaintiff Carroll and assess his damages at the amount of said wages, which they may find that he left with the defendant, with interest on said amount at the rate of six per cent per annum from the institution of this suit to this date." Of its own motion: 1. "If you believe that as a matter of fact the plaintiff has received from defendant the various amounts of money shown by the pay-rolls opposite his signature, and that the same was the full amount of the wages by him earned, then you must find for defendant. 2. The court instructs the jury that if they believe from the evidence, that plaintiff gave a part of his wages to Wm. B. Ryder for safe keeping, or permitted him to take a part of his wages for his individual use, and at the same time signed a receipt in full to the defendant, intending thereby to acquit the defendant of all further liability to him on account of the money so given to or permitted to be taken by said Wm. B. Ryder, then the defendant is not liable in this action, even though said Ryder has not refunded the amounts entrusted to him. 3.

Digitized by Google

The receipts of the plaintiff that have been read to you are *prima facie* evidence that the plaintiff has received the full amount in said receipts specified, and the burden of proof is on the plaintiff to satisfy you that he has not in fact received the sums specified therein."

And the court refused the following instructions requested by the defendant: —

"1. The court instructs the jury, that if they find from the evidence that the secretary and treasurer on each pay-day was provided by [the company] the plaintiff (*sic*) with sufficient money to pay off all its employes, including the plaintiff, and that on each pay-day the plaintiff signed a receipt in full of his demands against the company, then the court instructs the jury that the defendant is not liable to plaintiff for any sum left by him in the possession of Mr. Ryder, unless they find that he had authority from the company to receive and retain such money left in his hands by plaintiff as aforesaid.

"2. The court instructs the jury that if the defendant paid over to its secretary the full amounts due by it to the plaintiff, and that said secretary offered to pay the full amounts to plaintiff, and that he receipted for same in full, but left it in his hands as an individual for safe keeping, that then plaintiff can not recover of the defendant."

The plaintiff had a verdict and judgment for the amount claimed. The rulings which are objected to, are: —

1. That the court erred in permitting the plaintiff to testify as to conversations had with Ryder, the defendant's secretary and treasurer, and as to agreements made between Ryder and the plaintiff as to plaintiff's leaving his money "in." We are referred for these rulings to pages eight and ten of the record. We do not see that any exceptions were saved to such rulings, and therefore we can not consider these assignments of error.

2. That the court erred in excluding evidence offered by the defendant to show that the money to pay all the men

Digitized by Google

was, on each pay-day, handed to Ryder to be paid to the men, and was charged to the company by him as actually paid to the men. There was no error in excluding this evidence. There is no principle known to the law by which the plaintiff's right could be affected by any transaction between the defendant and its secretary and treasurer, or by any entries made by the latter upon the books of the company, not known to the plaintiff. We shall not take time to argue so plain a proposition.

3. That the court erred in refusing to permit the defendant to show in what capacity Ryder kept the money in question. This objection fails, for the same reason upon which the previous objection fails. It was wholly immaterial, so far as the plaintiff was concerned, in what capacity Ryder kept the money in question, since there was no evidence tending to show that the plaintiff knew that he kept it in any other capacity than as the treasurer of the defendant. Suppose Ryder had been allowed to answer the question, and had said that he kept it in his own individual capacity, and converted it to his own use; the plaintiff would be entitled to reply: "I knew nothing of that; you did not inform me that you kept it in your individual capacity, nor did any other person, acting on behalf of the company, so inform me. When you retained it, you did not appear or pretend to be acting for yourself, but you appeared to be and were acting as treasurer of the defendant. You did not in my presence or with my knowledge enter the fact of your retaining this money in a private memorandum book of your own, but you entered it before my eyes on the books of the company. Having thus led me to believe, by your conduct, that the money was retained by you in the treasury of the company, and for the company, I am not to be prejudiced by the fact that you may have converted the money to your own use. That is a question between you and the company." The case cited by the learned counsel for the defendant (*Gardner* v. *Omnibus Co.*, 15 Ch. Leg. N. 312) is not in point;

Digitized by Google

because there the court found, as a matter of fact, that the plaintiff intended to make the secretary of the defendant his agent, to receive and keep in his individual capacity the plaintiff's salary, as the plaintiff's banker or depositary. If there is any evidence tending to show such a fact in this case the jury have negatived it by their verdict.

The learned counsel for the defendant invokes the rule of law, that where one of two innocent persons must suffer by the act of a third person, it must be that one who put it into the power of the third person to do the wrong or practice the deceit. In support of this view, it is argued that the plaintiff was aware of the rule and practice of the defendant to pay off its employés on the third and eighteenth of each month, and to require every one to draw his wages and sign the pay-roll on those days; that, with this knowledge, the plaintiff signed a receipt on each pay-day for the full sum of the wages due him, and thus put it into the power of Ryder, who was only authorized to pay out, to make the defendant believe, by means of these pay-rolls, that the men were paid in full on each pay-day; that the retention of any moneys by Ryder, was not only not within the scope of his agency, but was against the express rules and practice of the defendant; and, hence, that in this matter Ryder was, in respect of the defendant, a third person. It will be perceived, by recurring to the statement of facts, that this argument is based upon stronger assumptions of fact than are warranted by the testimony given at the trial. It does, indeed, appear that it was the rule and practice of the defendant to pay its employés twice a month on the days named; that all the employés had notice of this rule and practice, and that they were required to go up and sign the pay-roll on those days. But it does not appear that it was the rule and practice for the defendant on those days to pay to every employé the entire amount due to him, whether he desired to receive it or to leave a portion of it with the defendant. Neither is there any evidence tending to show that the plaintiff knew that Ryder was only authorized to pay out. On

Digitized by Google

the contrary, Ryder's own testimony shows that this practice of retaining portions of the moneys due such of the men as did not desire to draw their full pay on each pay-day, had been going on for twenty-three years; the sums not drawn, or if handed over to the men, handed back by them, being checked by him in pencil on the pay-roll of the company. If the rule and practice is to govern, it is hard to understand on what principle the plaintiff is to be charged with negligence, from the mere fact of signing the pay-roll for the full amount, when, at the same time, a counter-check went down, showing that the full amount had not been paid. If the principle which is here invoked has any application to this case at all, it is hard to see how it can be applied against such employés of a corporation as street car conductors, most of whom, it is to be presumed, are not acquainted with financial matters, and in favor of the corporation itself, when the latter, for twenty-three years, had exercised so slight a supervision over its chief financial officer, that the course of business here described had been practiced publicly by such officer at the company's chief office and place of business, during this long period of time. If this principle has any operation at all in this case, its operation would seem to be exactly the reverse of that contended for. Persons dealing with corporations are not bound to suspect fraud or to institute inquiries where everything seems fair, honest, open, in conformity with the usages of the corporation, and within the apparent scope of the powers of the agent with which they are dealing.

Indeed, this case is very simple and entirely free from doubt. It is simply a renewed struggle over the old question with which courts of justice have had to deal ever since corporation have existed, namely, whether the public is to be the guarantor of the honesty of the agents of the corporation, or whether the corporation is to be the guarantor of the honesty of its own agents. Where the act done by such agent was done in the apparent exercise,

Digitized by Google

and within the apparent scope, of his agency, this question has never been decided, except in one way, and that is against the contention of the defendant in this case.

The same may be said of the argument that the defendant had no notice of these transactions between Ryder and the plaintiff. Indeed, Mr. Walsh, the defendant's president, testified that the company had no knowledge of them; but that was the statement of a conclusion of law, such as a business man, not knowing the law, might easily fall into. The witness, no doubt, meant to convey the idea that the president and directors had no knowledge of them. But whether the president and directors had such knowledge or not, the corporation, nevertheless, had knowledge; for it is a rule of law that, whatever a general agent of a corporation knows, when acting within the scope of his agency, touching the business of his agency, is the knowledge of the corporation. *Mechanic's Bank* v. *Schaumburg*, 38 Mo. 228; *Hayward* v. *Insurance Co.*, 52 Mo. 181. The knowledge of Ryder, in respect of these transactions, was imputable to the company; and the fact that, in violation of his duty to the company, he may have withheld this knowledge from its president, is a matter with which, in the absence of collusion between Ryder and this plaintiff, which is not shown or suggested, the plaintiff has no concern.

Tested by these principles, no just ground of exception is perceived to the instructions upon which the court submitted the case to the jury. It seems equally clear that the first instruction offered by the defendant was rightly refused. It makes the plaintiff the warrantor of the fidelity of the defendant's secretary and treasurer, to the defendant. It involves the conclusion that a written receipt, showing the payment of a sum of money, is conclusive evidence of the payment of such money, and estops the party signing such receipt from showing the contrary, which is not the law. 1 Greenl. Ev., sect. 305; *Riley* v.

Digitized by Google

Kershaw, 52 Mo. 224; *Bigbee* v. *Coombs*, 64 Mo. 529. There is less difficulty in applying this principle here than in ordinary cases, because it appears that, although the pay-roll which the plaintiff receipted on each pay-day showed the full amount due him since the previous pay-day, yet it appears that this receipt was varied at the time he signed it by the act of the defendant's secretary and treasurer in entering upon it the amount which, in point of fact, was not paid. The defendant's second instruction was also rightly refused, for the reason already suggested, in so far as it involved the conclusion that the signing of the pay-roll operated as an estoppel against the plaintiff from showing that he had not received the amount originally written on the pay-roll; and, in so far as it directed the jury to find for the defendant, if the plaintiff left the money in Ryder's hands as an individual for safe keeping, because it was covered by the second instruction given by the court of its own motion.

The judgment of the circuit court is accordingly affirmed. All the judges concur.

ANTHONY MEAGHER, Respondent, *v.* PEOPLE'S AND TOWER GROVE RAILWAY COMPANY, Appellant. 14 499 / 100 244

December 18, 1883.

AGENCY — EVIDENCE. — Statements or declarations made by an agent while acting within his real or ostensible authority, are admissible as a part of the *res gestæ*.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

GIVEN CAMPBELL, for the appellant.

MCKEIGHAN & JONES, with E. J. O'BRIEN, for the respondent

THOMPSON, J., delivered the opinion of the court.

This case was tried in the circuit court at the same time with the case of *Carroll* v. *The People's and Tower Grove Railway Company* (*ante*, p. 490), before the same judge and the same jury, and the plaintiff had a verdict and judgment for the amount claimed. The facts which appeared upon the trial of this case were substantially the same as those which appeared with reference to the other case, with the exception that the testimony of this plaintiff brings out the facts, if possible, more clearly in favor of the ground on which his counsel have based his right to recover; while the testimony of Mr. Ryder, for the defendant, presents the grounds of the defence, if possible, in a clearer light than in the former case. It is scarcely necessary to say that it must be borne in mind that, in dealing with conflicting evidence in a case at law after verdict, an appellate court is concerned, not with the weight of evidence, but with the question whether there was substantial evidence to support the verdict. Here, as in the former case, the evidence undoubtedly conduces to show that the president of the defendant corporation knew nothing of the practice of Ryder, its secretary and treasurer, to allow such of its employés as desired to do so, to leave a portion of their money "in," or "in the office," or "on the book," which practice, the evidence shows, he had kept up for twenty-three years. The evidence also shows, without any room for question, so far as it was not excluded by the court, that Ryder retained this money for his own use, and not for the use of the company. But there is no substantial evidence in this record tending to show that this plaintiff knew, or that Ryder ever informed him or intimated to him, that he kept this money in any other capacity than as the treasurer of the company. The marks that Ryder was in the habit of making on the pay-roll at the time when the plaintiff would sign it on pay-day, "$20 in," "$15 in," or "$10 in,'

Digitized by Google

as the case might be, which marks were made in the presence of the plaintiff, had the effect, undoubtedly, of indicating to the mind of the plaintiff the contrary, and of suggesting to him that the moneys which Ryder did not hand over to him remained in the treasury of the company subject to his demand. Moreover, it appears that on one occasion the plaintiff requested Ryder to pay him some of the money which the plaintiff had thus left "in," which Ryder did, taking the money from the safe where the office funds were kept.

We may here dispose of a question which was brought to our attention by the brief of the defendant in the Carroll case, but which we were unable to consider in that case, because the bill of exceptions in that case did not show that the proper exception had been saved at the trial. That question is this, whether the court erred in permitting the plaintiff in his testimony to detail conversations which took place between him and Ryder on pay-days, when the plaintiff would go to draw his pay, touching the plaintiff's leaving a part of his money in the office. There was clearly no error in admitting these conversations. What an agent says when acting for his principal, within the scope of his real or ostensible authority, with reference to a given matter touching the subject of his agency, is always admissible in evidence as a part of the *res gestæ* — just as much as the declaration of the principal, if so acting for himself, would be admissible. If this were not so, no verbal contract could be proved if made with an agent of the other contracting party; nor could any verbal contract with a corporation be proved at all; since a corporation can only act by agents.

For these reasons, and the reasons stated in the opinion of the court in the case of *Carroll* v. *this defendant*, the judgment of the circuit court is affirmed. All the judges concur.

Digitized by Google

14 502
127m 148
14 502
165s 810
14 502
d100 646

POPE IRON AND METAL COMPANY, Appellant, *v.* FRED. BEST, Respondent.

December 18, 1883.

1. **CONTRACT — BREACH OF — DAMAGES. — In an action for a breach of a contract to erect a furnace "in a good and workmanlike manner, and to guarantee the said furnace to work satisfactorily in melting iron," the court properly rejects evidence that the furnace did not work to the plaintiff's satisfaction.**
2. **—— EVIDENCE. — Evidence of the cost of testing the furnace after its completion was properly refused, inasmuch as the cost of making the test was not to be paid for by the defendant.**

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

TAYLOR & POLLARD, for the appellant.

J. D. JOHNSON, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This action is brought for damages which the plaintiff alleges it has sustained through the breach, by the defendant, of a contract made with the plaintiff, by which the defendant agreed to erect a certain furnace according to plans furnished by the defendant. The answer consists first, of a general denial, and then of three counter-claims. The first is for the balance due the defendant under the contract mentioned in the plaintiff's petition, for erecting the furnace; the second is a claim for certain lime and cement furnished by the defendant at the request of the plaintiff in constructing the furnace; the third, for extra work done by the defendant at the request of the plaintiff, in constructing a deflector in the furnace and in furnishing the materials therefor. The jury found for the defendant on the plaintiff's cause of action, and also for the defendant on each of the three counter-claims. Judg-

ment was entered accordingly and the plaintiff has appealed.

At the trial, the contract under which the furnace was erected was put in evidence. It reads as follows: —

"*Mess. Pope Iron and Metal Co., St. Louis, Mo.*

"GENTLEMEN — I hereby propose to build an air furnace at your warehouse, Fourteenth and Gratiot Streets, for the sum of seven hundred and thirty-seven dollars, and fifty one-hundredths dollars; you to furnish all material for same and to put the foundation for the furnace and stack, also to erect iron work for the stack. I to furnish all the labor to build the furnace and line the stack, according to the plans to be furnished by me, and promise to do all the work in a good and workmanlike manner, and guarantee the said furnace to work satisfactorily in melting iron. Payment to be made as soon as the first heat is satisfactorily run off. The work to be completed within thirty days from the time of commencement."

1. The plaintiffs offered to prove that the furnace that was built by the defendant did not do its work in any regard to *its* (the plaintiff's) satisfaction; to which offer the defendant objected, and the court sustained the objection. There was no error in this ruling. The contract did not stipulate that the furnace should work to the satisfaction of the plaintiff. It "guaranteed the said furnace to work satisfactorily in melting iron," and payment was to be made as soon as the first heat was "satisfactorily run off." The opinions and feelings of the managers of the plaintiff corporation were not, by this contract, made the test by which the proper execution of it was to be determined; and we can not construe the language quoted so as to produce a result so improbable as that the defendant intended to submit his rights wholly to the caprice of the officers of the plaintiff. The contract, fairly construed, meant that the furnace

Digitized by Google

should work satisfactorily to a reasonable and fair-minded man, who was an expert in such matters.

2. The court in ruling upon the evidence and instructing the jury, rejected as a measure of damages the cost to the plaintiff in making tests of the furnace. The contract did not stipulate that these tests should be made at the cost of the defendant. He had no concern with what the plaintiff did with the furnace after he completed it and turned it over to them; and we know of no rule of law which, in the absence of an agreement to that effect, authorized them to experiment with it as his expense.

3. The remaining objections are to the instructions of the court, and they have been substantially answered by what has already been said with reference to the meaning of the word "satisfactorily" in the contract. The court refused an instruction which told the jury that they should find for the plaintiff if they "believed, from the evidence, that the defendant failed to erect the furnace in question in a good and workmanlike manner, or failed to erect it so that it worked satisfactorily in melting iron, or so that any (*sic*) heat therefrom was run off satisfactorily until after the plaintiff had it altered." But the court, in lieu thereof, gave an instruction which told the jury to find for the plaintiff if they believed, from the evidence, that the defendant failed to erect the furnace in question in a good and workmanlike manner, according to the plans furnished therefor, or failed to erect it so that it worked satisfactorily, that is, *reasonably well*, in melting iron. We think these rulings were entirely correct. We think the word "satisfactorily," as used in the contract did not mean that the defendant obligated himself, in erecting the furnace, to satisfy any whim or caprice of the plaintiff's officers or agents, but that it meant that he should do the work reasonably well.

This judgment is accordingly affirmed. All the judges concur.

Digitized by Google

HARDEMAN CREWS, Plaintiff in Error, v. JOSEPH GARNEAU, Defendant in Error.

14 505
50 337

December 18, 1883.

1. CONTRACTS. — He who enters into an executory contract and pays earnest money and then refuses to fulfil the contract, can not recover back the earnest money paid.
2. —— AGENCY. — An agent who disobeys the instructions of his principal may nevertheless bind his principal by his contracts made within the scope of his authority.
3. —— NOTICE. — Notice by the principal to the other party to an executory contract that the agent had, in making the contract, disobeyed instructions will not relieve the principal from obligations which have become fixed under the contract.
4. —— Where one of two innocent persons must suffer from the act of a third person, he must suffer who, by his act, has enabled the third person to do the wrong.

APPEAL from the St. Louis Circuit Court, LINDLEY, J. *Affirmed.*

JOHN W. BOOTH and T. W. B. CREWS, for the plaintiff in error.

ALEX. MARTIN, for the defendant in error.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff authorized James P. Brennan, as his agent, to effect the purchase of certain lands belonging to the defendant. The agent was specially instructed as to price and terms of payment, and as to the sort of deed which the plaintiff would accept. He was also given a check for $500, with directions to place it in the hands of Alexander Martin, who was understood to be the defendant's attorney and adviser, as an earnest of the plaintiff's sincerity, and to be held by Martin until the consummation of the purchase upon the stipulated terms. Brennan, instead of conforming to his instructions, gave the check to the

defendant himself, and took a receipt in his own name, setting forth that the defendant was to give Brennan a quitclaim deed for the land, and otherwise expressing the terms of a sale and conveyance from the defendant to Brennan. These terms and the character of the deed mentioned, were totally different, in nearly every material feature, from those for which the plaintiff had stipulated in his instructions to the agent. Within a few days, and as soon as was reasonably practicable after receiving information of what had been done, the plaintiff informed the defendant that Brennan had been acting as his agent in the matter, protested against the terms expressed in the receipt, and demanded that they be so modified as to conform to the agent's instructions, or else that the check be returned to the plaintiff. The defendant refused to comply, tendered a deed in accordance with the terms of the receipt, which the plaintiff refused, and afterwards sold the land to a third person for a price less than that which the plaintiff had been willing to pay and which was expressed in the receipt. In this action the plaintiff charges that the defendant collected the amount of the check, and judgment is asked for that amount, with interest. The answer avers, among other matters, that defendant contracted to sell the land to Brennan, and so gave the receipt, and received the check as a payment made by Brennan upon his own purchase of the land. The cause was tried before the court without a jury and judgment was given for the defendant.

The testimony tended generally to show the facts embodied in the foregoing statement, without any material conflict except as to whether Brennan, in negotiating for the purchase, informed the defendant that he was acting for the plaintiff who was his principal, and not for himself. Brennan testified that he did so inform the defendant. The defendant, and another witness, testified to the contrary effect. As to the court's conclusions of fact, it is sufficient to say, that there was testimony substantially tending to

Digitized by Google

support them, and this leaves nothing for our review, but the action of the court in the giving and refusing of instructions. Those which the plaintiff deems material to the present inquiry, are the following: —

Given for the defendant: —

"If the court, acting as a jury, finds from the evidence that the check described in the petition was made payable to Brennan, and that Brennan indorsed and paid it over to defendant upon a contract of purchase, as is recited in the receipt on file, and that at the time of such payment the defendant was not informed that Brennan was acting as agent for plaintiff, and received the money or check from said Brennan, and agreed to sell to said Brennan the land described in said receipt upon the terms recited in the same, and that said defendant was ready and offered to perform said agreement by delivery of the deed called for in said receipt to Brennan, or to the person designated by said Brennan, after the delivery of the receipt, as the person to whom to make his deed, and that neither said Brennan nor his said appointee would accept the deed and pay the balance of the purchase-money, then defendant is not liable to plaintiff and the plaintiff can not recover.

"If the court, acting as a jury, finds from the evidence that Brennan was the agent of plaintiff for contracting for the purchase of the land with defendant, and making part payment thereon, and that defendant knew that Brennan was acting for plaintiff as his agent as aforesaid, and that the contract recited in the receipt was within the scope of the agency aforesaid, then the plaintiff is bound by such contract, notwithstanding secret and undisclosed instructions to said Brennan indicating a limitation on the authority of said Brennan, making the terms of said purchase; and if said plaintiff is liable as aforesaid on said contract, and refused to accept the deed or complete said sale, then he is liable in damages for such refusal; and the measure of damages in such case would be the difference between the contract

Digitized by Google

price and the salable value of said lands at the time of the breach aforesaid, which damages, if any, defendant would have a right to recoup against the plaintiff in this action, if the court should find as expressed in this instruction."

Given for the plaintiff: —

"If the court finds from the evidence that the plaintiff is entitled to recover the amount of the payment made to defendant by plaintiff through Brennan, by reason of said Brennan having exceeded his authority as agent of plaintiff, then plaintiff is entitled to recover interest upon said payment from the time when defendant was notified that plaintiff would not abide by the contract made by said Brennan, but if the court should find that plaintiff is entitled to recover the said payment by reason of the resale and conveyance of the said land by defendant, then plaintiff is entitled to recover such interest only from the time of such resale and conveyance."

Refused on the plaintiff's application: —

"1. If the court finds from the evidence that James P. Brennan, as agent of plaintiff, was authorized for plaintiff to enter into a contract with defendant for a conveyance by defendant and his wife by special warranty deed of certain lands, and was not authorized for plaintiff to contract for a conveyance by simple quit-claim deed of said lands, and yet did enter into a contract with defendant for a conveyance of said lands by quit-claim deed without any warranty, and as part payment of the consideration of such contract, paid defendant by check or otherwise $500, the property of plaintiff, and that within a reasonable time thereafter plaintiff was notified of the particulars of said contract and payment, and, in turn, within a reasonable time thereafter, plaintiff notified defendant that in making said contract and payment, said Brennan exceeded his authority as agent of plaintiff, and that plaintiff would not abide by said contract, and that from the time of such notice defendant has recognized and treated plaintiff as the real party

Digitized by Google

in said contract, and has, since receiving said notice, sold and conveyed said lands, so that he no longer hath any interest therein; then by such resale and conveyance of said lands defendant has rescinded the said contract, and plaintiff is entitled to recover said payment.

"4. If the Court finds from the evidence that James P. Brennan was authorized by plaintiff as his agent to contract with defendant, to pay defendant for a conveyance of certain lands a price not above $16 for each acre of said lands, and was not authorized as agent of plaintiff to contract to pay any attorney's fees incurred by defendant, or any taxes owing by defendant, and yet, as such agent, entered into a contract with defendant for the payment of $15.50 per acre, and for the payment of all taxes due on said lands, and for the payment of all attorney's fees incurred by defendant on account of said land, and as part payment of the consideration of said contract, paid defendant $500, the property of plaintiff; then said contract and payment were without the authority of said agent, and plaintiff is entitled to recover the said payment from the defendant.

"7. If the court finds from the evidence that plaintiff authorized one James P. Brennan to buy for him upon certain terms the land of defendant, and that afterwards said Brennan, assuming to act as agent of plaintiff, made a contract with defendant for the purchase of said lands upon terms beyond his authority as agent of plaintiff, and upon such contract assumed to pay defendant, and did pay defendant $500, the property of plaintiff, and that at the time of making such contract and payment, defendant was told by said Brennan that he was making said contract for himself, and that within a reasonable time after the making of said contract and payment, plaintiff was informed of the terms of said contract, and of the fact of said payment, and notified defendant within a reasonable time, that in making said contract and payment said Brennan in fact acted as agent of plaintiff, and had purchased the land

Digitized by Google

upon terms not authorized by plaintiff, and had paid plaintiff's money thereon, and that plaintiff would not abide by such contract, and that notwithstanding such notice the defendant persisted in holding said payment, and attempted to compel plaintiff to perform said contract, by tendering plaintiff a conveyance of said lands, or by entering into any arrangement with plaintiff, whereby actual tender of a deed was waived, and resold and conveyed said land without tender of a conveyance thereof to said Brennan, or otherwise seeking to hold said Brennan liable as principal in said contract; then, as there is no evidence in this case tending to show any material change in the situation of the parties or of the property which was the subject of the contract, between the time when the contract was made, and the time when the defendant was notified of the true character in which Brennan acted in making the contract and payment, the fact that Brennan told defendant he was buying for himself, is not material to plaintiff's right to recover the payment so made by said Brennan.

"10. Defendant avers that the damages he asks to recover are the result of a second sale made by him after plaintiff had refused to comply with the terms of the first sale, for a less price than Brennan contracted to pay, but he does not aver nor introduce any evidence tending to show that such second sale was a forced sale, nor that the property or his interest therein deteriorated in value between the first and second sale, nor that the plaintiffs' alleged breach affected the market value of his interest in the property, nor that before making the second sale he notified plaintiff or Brennan of his intention to resell the property; and therefore the difference between the last sale and the first sale ought not to be regarded as evidence of the amount of the damages defendant may have sustained.

"11. If the court finds from the evidence that James P. Brennan made the payment to defendant and accepted the

Digitized by Google

receipt therefor, read in evidence in this case, upon such a misunderstanding of the contract between himself and defendant that he believed said contract to contain provisions which it did not in fact contain, and believed it not to contain certain provisions which defendant believed and maintains that it did contain, then there was no such agreement between said Brennan and defendant as is necessary to make a binding contract; and the payment made to defendant was made without consideration, and defendant is entitled to no relief or damages for the failure of plaintiff to carry out the contract as understood and assented to by defendant.''

The first instruction given for the defendant was clearly proper. It asserts the familiar rule that, if two persons enter into an executory contract and one of them pays earnest money on the agreed consideration, and afterwards fails and refuses to fulfil the contract on his part, he can not recover back the earnest money paid. In the hypothesis presented, there was nothing to put the defendant upon inquiry as to the ownership of the check, but everything to induce an honest belief that it was Brennan's property, and that Brennan was using it in a purchase of the land for himself. As to the second instruction, whether it was right or wrong can be of no consequence to the plaintiff, since the court allowed nothing for recoupment to the defendant, having evidently found, as a fact, that the defendant did not treat with Brennan as an agent for the plaintiff. We think, however, that the instruction correctly stated the law.

An erroneous theory, pervading all the plaintiff's instructions which were refused, seems to hold the defendant responsible for the derelictions of Brennan, upon a mere notice from the plaintiff that Brennan had been derelict. Every proper instruction in the case should provide, inferentially or otherwise, for a hypothesis that the defendant was ignorant of Brennan's agency. Upon that hypothe-

Digitized by Google

sis — which the trial court found to be the true one — the defendant, when he closed the trade with Brennan, received the check from him, and gave the receipt specifying the terms of the agreement, acquired certain contract rights which were fixed then and there. Nothing was wanting to complete his *status*; as the holder of a valid claim upon Brennan for an entire execution of the contract settled between them. How can it be conceived that the rights so vested in a vendor and fully sanctioned by existing law, could be set aside or impaired by subsequent information of wrongs done to a third party, in which the vendor had no part, and of which he had not even any knowledge? The bad faith of Brennan with the plaintiff, if any, is a matter to be settled between them. The measure of the plaintiff's damages, as against Brennan, may possibly cover, not only the conversion of the check, but the consequences resulting from the loss of a beneficial trade, whose consummation had, for a consideration, been entrusted to him by the plaintiff, and assumed by Brennan. But with all that the defendant had nothing to do, when his contract rights accrued. The plaintiff, by making the check payable to Brennan, had put it in his power to trade upon the paper as his own, with no ground for inquiry or even for hesitation, on the part of any person to whom he might offer it. The familiar rule referred to by plaintiff's counsel — that, where one of two innocent persons must suffer by the act of a third, he must suffer who has reposed the confidence which enabled such third person to do the thing complained of — is precisely in point, and fixes the loss upon the plaintiff. It is unquestionable, further, that Brennan was in a position to enforce specific performance of the contract shown by the receipt, against the defendant. Could the defendant have resisted such a proceeding on the ground that Brennan was only an agent, and exceeded his authority? Assuredly not. How, then, shall he be denied the benefits of a contract, while bound by its liabilities?

Digitized by Google

If the plaintiff's doctrine is to prevail, no man can ever know what are his contracts, or at what period his rights under them will have become vested. An agreement may be solemnized with all the forms of law, and may yet be broken up by the advent of a stranger, who will say to one of the parties: "The person with whom you have contracted was my agent, and I did not authorize him to make that contract."

The plaintiff insists that the defendant, upon receiving notice of Brennan's agency, and of his violated instructions, was bound to return the check and cancel his contract, because he had not yet conveyed the land, or given possession. We know of no principle, in law or equity, which sustains such a view. If, at the time of making the contract, there had been any notice to the defendant, or anything to put him upon inquiry, his contract rights would have taken effect, subject to any equities involved in the matter of such notice or cause for inquiry. And this would be true at any time before, and up to, an actual change of *status*, by virtue of the contract, without such notice or cause for inquiry. But here, the defendant was not in *statu quo* when he received the notice. He had bound himself in a contract to convey the land, and, so far, was no longer an untrammelled owner of the property. He had acquired an absolute right to the purchase-money, upon the agreed terms. Neither his rights nor his obligations were qualified by any equities of which no intimation was given, until after such rights and obligations had accrued.

That the plaintiff has suffered a wrong, need not be questioned. But he should seek redress from him who inflicted the wrong, and not from this defendant who, in exercising an unquestionable right to contract for the sale of his land, neither knew of, nor had any reason to suspect, that the plaintiff was in any way interested in the transaction. Such, at least, was the finding of fact by the trial

Digitized by Google

court, and, upon that basis, the judgment was for the right party. We find nothing in the record to justify a reversal. With the concurrence of all the judges, the judgment is affirmed.

LEWIS, P. J., delivered the opinion of the court on the motion for rehearing.

The earnest and able argument offered in support of the motion for a rehearing rests, for all it is worth, upon a single fundamental proposition, to wit: that the improper use made of the check by Brennan was such a conversion of the plaintiff's property as left in the plaintiff a right to reclaim it in the hands of the defendant, or wherever else he might find it; and especially, upon a demand made before the holder had actually conveyed the real estate contracted for and sold, with the receipt of the check as a part of the consideration. If this proposition is correct, there need be no further argument to establish the plaintiff's right of recovery. But if it is unsound and subversive of well established principles, then all the deductions set forth and amplified in the carefully prepared briefs for the plaintiff must fall with it.

Whether or not the act of Brennan in misusing the check amounted to a conversion of the plaintiff's property, is by no means the vital inquiry in this case. It furnishes no test of the plaintiff's rights, except as against Brennan himself. If A. steals the horse of B. and sells it to C., B. may reclaim his property from C., or from his transferee, as upon an unchanged ownership. This, however, is not because of the sale and conversion, but because of the original theft. The owner is innocent of any act from which C., or anybody else, might have reason to suppose that the thief had any rights in the property. But the books are full of cases wherein, while the owner may maintain an action against his bailee for a conversion or misappropriation, he will yet have no remedy against the innocent

Digitized by Google

holder of the property for value, or for a lawful consideration. Especially is this true as to money, checks, and negotiable paper generally. The necessities of trade and the laws of commerce have long since settled that, as to such instruments, their negotiable character raises a presumption of ownership in the present holder, beyond which an intending purchaser need never look for an assurance of the title, unless specially put upon inquiry by some suspicious circumstances. In the leading case of *Miller* v. *Race* (1 Burr. 452), before Lord Mansfield, it was held that "a bank-note, though stolen, becomes the property of him who gives valuable consideration for it, having no notice or knowledge of the robbery." In *Grant* v. *Vaughan* (3 Burr. 1516), the doctrine was reaffirmed and adjudged applicable, in like manner, to every description of negotiable instruments. In *Lawson* v. *Weston* (4 Esp. 56), a bill of exchange, accepted by the defendants, was lost by or stolen from Shears, the owner, who immediately advertised the loss. An unknown person found the bill, and procured it to be discounted by the plaintiffs. It was held that the plaintiffs were the lawful owners, and were entitled to recover. In *Buck* v. *Kent* (3 Vern. 99), the payee was in possession of a note, which the maker was entitled to have returned to himself. The payee, however, wrongfully transferred the note to a third person. It resulted that the assignee, as owner, had judgment against the maker, although the maker successfully maintained trover and conversion against the payee. That case, in its salient features, bears a striking resemblance to the one before us; the plaintiff here occupying the place of the maker, Brennan that of the payee, and the defendant that of the assignee. The rule is sustained by an unbroken train of authority, with a general concurrence in the remark of Lord Kenyon, that a contrary principle, "would at once paralyze the circulation of all paper in the country, and with it all its commerce." *Jones* v. *Nellis*, 41 Ill. 482.

Digitized by Google

If a legal investiture of ownership in the present holder, in defiance of the claims of one who has been deprived of it by wrong, accident, or fraud, may thus result from the presumption of transfer attaching to the fact of negotiability, how much stronger must the case be against a party who adds to this presumption a deliberate notice to all the world, that he has parted with the ownership, in favor of the person who afterwards passes the paper to an innocent assignee. Such was the act of the present plaintiff when he made his check payable to the order of Brennan.

But it is insisted that the defendant parted with nothing, as a consideration for the check. It can hardly be necessary to remind learned counsel that contract rights are as sacred in the eye of the law as any right of ownership in property. The defendant acquired certain contract rights, and assumed certain liabilities, in his transaction with Brennan. The plaintiff refuses to recognize the first, and has never had it in his power to release the last. Nor was the defendant under any obligations to accept such a release, if it had been tendered him by the proper person. This suit asks us, in effect, to compel him to accept the release, even from a person not authorized to give it, and also to surrender his duly acquired contract rights against Brennan.

Counsel say that Brennan was only a messenger, bearing a letter to Martin which contained the check, and which he opened without authority, in order to withdraw the check and deliver it wrongfully to the defendant. That, therefore, Brennan was not to be regarded as an agent, conducting a negotiation for the plaintiff. The authorities above cited show that, if this were true, it would be wholly immaterial, as affecting the defendant's right to keep the check. But the position is hardly consistent with the plaintiff's constant claim that Brennan's purchase was affected as a mere act of agency for the plaintiff who, as principal, might insist upon an adherence to the instructions he had given. Nor is it

Digitized by Google

consistent with the terms of the letter which Brennan bore. In that, the plaintiff's father says: "My son, Hardeman Crews, has just contracted, through Judge Brennan, for two hundred and forty acres of land belonging to Mr. Joseph Garneau," etc. He says, further: "Judge Brennan will hand you, or Mr. Garneau, a check for $500," etc. The last expression savors strongly of an agency in Brennan, with at least a discretion as to who should receive the check from him. But, as before said, all this is immaterial, when we consider that the check was made payable to the order of Brennan, and that nothing occurred to put the defendant upon inquiry as to his title and right of transfer.

The whole question in this case is, not so much whether the plaintiff has suffered a loss, for which he ought to be indemnified, as it is, whether he is undertaking to procure indemnity from the right party. Upon the record here made, there could hardly be a question as to Brennan's responsibility to the plaintiff. If a judgment against him would be unavailing, this argues only that it was the plaintiff's misfortune to put his trust in a faithless insolvent. It can furnish no sort of reason why the present defendant should be called upon to make things even. Courts can not gauge the extent of a party's liabilty by the state of his bank account. We may recognize the fact that a loss and hardship have fallen upon the plaintiff, but we can not change the conclusions already announced in this cause without reversing our firm convictions of the long established and well settled rules of law, and assuming the legislative function of creating new ones.

The motion for a rehearing must be overruled. All the judges concur.

Digitized by Google

JOHN L. WOOLF ET AL., Respondent, *v.* ANTONIO BERNERO, Appellant.

December 18, 1883.

1. BAILMENTS — DEPOSIT FOR ILLEGAL PURPOSES. — The illegality of raffling does not relieve the depositary of property taken for the purpose of raffling it from obligation to care for the same.
2. —— The depositary of property left with him to raffle is liable to the owner for the value thereof when it is lost by his gross carelessness.
3. —— That the property was left to be raffled is no part of the cause of action against the depositary for its loss, and it is immaterial that the owner's illegal object in leaving the property incidentally appears at the trial.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

JAMISON, COLLINS & JAMISON, for the appellant: The purpose of this bailment, being to play a game of chance for the ownership of property, is, within the meaning of section 1560 of the Revised Statutes of 1879, was a misdemeanor, and the court below erred in lending its aid to enforce an illegal act. — *Hayden* v. *Little*, 35 Mo. 418; *Waterman* v. *Buckland*, 1 Mo. App. 45. The contract between plaintiffs and defendant being one of bailment, and the defendant being a bailee without recompense or reward, was liable only for gross negligence, and the court erred in finding for the plaintiffs because there is no evidence in this case tending to show gross negligence. — Shouler on Bailments, 42, 58, and cases cited; *Wison* v. *Chesley*, 53 Mo. 550; *Spooner* v. *Mattoon*, 40 Vt. 300.

FRED. WISLIZENUS, for the respondent: 1. Illegality of bailment does not prevent a recovery by the bailor from the bailee for negligent loss by the latter. — *Frost* v. *Plumb*, 40 Conn. 111; *Stewart* v. *Davis*, 31 Ark. 523; *Michael* v. *Bacon*, 49 Mo. 474; *Charles* v. *McClure*, 57 Mo. 166.

Digitized by Google

2. The finding of fact that defendant was guilty of gross negligence is warranted by the law and evidence of this particular case. — *Wiser* v. *Chesley*, 53 Mo. 550; *Huxley* v. *Hartzell*, 44 Mo. 370; Schouler on Bailments, 58; Jones on Bailments, 38; *Tracy* v. *Wood*, 3 Mason, 132; Story on Bailments, sect. 74, p. 71; *Jenkins* v. *Molton*, 1 Sneed (Tenn.), 248.

BAKEWELL, J., delivered the opinion of the court.

This was an action begun before a justice of the peace, to recover the value of a diamond ring belonging to plaintiffs, and lost out of the possession of defendant.

On trial anew in the circuit court a jury was waived, and there was a finding and judgment for plaintiffs.

It appears that plaintiffs kept a retail shop up stairs and defendant a dramshop on the ground floor of the same building in St. Louis. Plaintiffs had taken in trade, at the valuation of $180, the diamond ring in question, of which the real value was only $125. Plaintiffs requested defendant to raffle off the ring in his saloon. Defendant at first declined to do so, but afterward consented, and received the ring for that purpose. It does not appear that defendant was to receive any compensation in the matter except such as might come indirectly from the custom attracted to the bar by the raffle. Defendant advertised the raffle by printing a large card set up in the saloon. There were two hundred chances, at a dollar a chance. The ring was delivered to defendant in June, 1881. In September only fifty-three chances had been sold, of which the greater number were taken by persons sent into the bar-room by plaintiffs. The ring was kept in the cash drawer back of the counter. When persons called for the ring it was passed to them for examination. The bar-keeper attended to the counter from early in the morning until eleven, and from one in the afternoon until seven, and the defendant attended the bar

Digitized by Google

from eleven to one, and from seven until eleven, when the saloon was closed. Defendant habitually took the ring home at night and returned it in the morning. On the day in September on which the ring was lost, two persons, whom defendant knew, called between eleven and one in the day time, and called for the ring. While they were examining the ring three strangers came in and called for drinks. Defendant served them, and others who came in, and thought no more of the ring until eleven at night, when he looked in the drawer for the ring and it was gone. Defendant then made all reasonable search and inquiry for the ring, but it was not found.

On behalf of plaintiffs the court declared the law to be that if the ring was lost by defendant while in his keeping, "through a want of such care thereof on his part as would be used, in circumstances such as appear in evidence, by a man of even less than the ordinary prudence exercised by men generally in taking care of their own property, the finding must be for plaintiff."

At the instance of defendant, the court gave a declaration of law to the effect that if defendant received no compensation for holding the raffle he was bound to take only slight care of the ring, and that, under the circumstances in evidence, if defendant exercised slight care of the ring, he was guilty of no negligence, and plaintiffs were not entitled to recover.

Appellant contends that the purpose of the bailment being illegal, there could be no recovery, and that, for this reason, the court erred in refusing an instruction asked by defendant in the nature of a demurrer to the evidence.

If the plaintiffs made an illegal contract in regard to their diamond, they may perhaps be liable to a penalty, and the courts will not aid them to enforce such a contract, nor to recover damages for the breach of it, but plaintiffs are not de-

Digitized by Google

prived by law of property in their diamond because they deposited it with defendant for the purposes of an illegal raffle. In order that they should recover in the present action, it was not necessary for plaintiffs to show that the diamond was deposited with defendant that he might put it up in a lottery; and the fact that it was received for such a purpose will not justify defendant in converting the diamond to his own use, or being utterly negligent in his custody of it. *Frost* v. *Plumb*, 40 Conn. 111; *Stewart* v. *Davis*, 31 Ark. 518; *Charles McCune*, 57 Mo. 166. If plaintiffs owned this diamond, and it came into defendant's possession by their permission, defendant was bound by law to take some care of it. If defendant was grossly negligent and in consequence of this gross negligence, the diamond was lost, this was an injury not caused in any way by the purpose for which the diamond was deposited with defendant. To use the language of Carpenter, J., in *Frost* v. *Plumb* (*supra*): "The plaintiff can not recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear and may be important even as explanatory of other facts in the case, he may recover."

The trial court found, as a fact, that defendant was guilty of gross negligence by reason of which the ring was lost. There was evidence to warrant such a finding, and we see no reason for disturbing the judgment. Judgment affirmed. All the judges concur.

Digitized by Google

14 522
100 1413

JAMES A. SMITH ET AL., Appellants, *v.* ST. LOUIS BEEF CANNING COMPANY, Respondent.

January 2, 1884.

1. ACTIONS — JURY — PRACTICE. — The test of a right of trial by jury is the action and not the defence or the issues.
2. —— EQUITY. — The interposition of an equitable defence to an action for a breach of contract does not deprive the plaintiff of his right of trial by jury.
3. —— CASE CONSIDERED. — The case of *Weil* v. *Kume* (49 Mo. 148), considered and held to be in disaccord with the earlier and more recent decisions on the question of the right of trial by jury.
4. —— MISTAKE — CONTRACTS — REFORMATION OF. — A writing, a mistake in the drafting of which makes it express an undertaking other than that agreed upon, may, on proper application, be reformed so as to express the true agreement.

APPEAL from the St. Louis Circuit Court, THAYER, J
Reversed and remanded.

KLEIN & FISSE, for the appellants: The plaintiffs were entitled to a trial by jury, and the court erred in denying a jury trial. — *Davis* v. *Morris*, 36 N. Y. 569; *Ragan* v. *McCoy*, 29 Mo. 356; *The State ex rel.* v. *Meagher*, 44 Mo. 356; *Peacock* v. *Nelson*, 50 Mo. 256; *Kitchen* v. *Railroad Co.*, 59 Mo. 514; *Wolff* v. *Schaffer*, 4 Mo. App. 367; *Pitcher* v. *Hennessey*, 48 N. Y. 415. Upon the case made by the evidence, the so-called "decree" or the judgment rendered by the circuit court, is clearly against right and justice, and is also against the law governing such matters. — Kerr on Fraud and Mistake (Bump's ed.), 409, *note*, 421, 436; *Mead* v. *Insurance Co.*, 64 N. Y. 455; *De Jarnett* v. *Cooper* (Cal. S. Court), 13 Cent. L. J., 251; *Allen* v. *Carter*, 8 Mo. App. 485; *Botsford* v. *McLean*, 42 Barb. 445; *Macalpine* v. *Swift*, 1 Ball. & B. 285, 293; *Diman* v. *Railroad Co.*, 5 R. I. 130.

Digitized by Google

NOBLE & ORRICK, for the respondent: The cause was triable before the court, without the intervention of a jury, because of the equitable defence or cross-bill.—*Freeman* v. *Wilkerson*, 50 Mo. 554. When an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement.—*Hunt* v. *Rousmaniere*, 1 Pet. 13; *Cassidy* v. *Metcalf*, 66 Mo. 528, 529; *Leitendorfer* v. *Delphy*, 15 Mo. 160; 1 Story's Eq. Jur., sect. 152; *Reed* v. *Root* (Iowa), N. W. Rep. 323. The mistake must be mutual and clearly proved.—*Mead* v. *Insurance Co.*, 64 N. Y. 455; 1 Story's Eq. Jur., sect. 157.

LEWIS, P. J., delivered the opinion of the court.

Plaintiffs claim damages in the sum of $24,750 for the breach of a contract whereby the defendant corporation was to purchase and receive from them 8,000 tons of ice during the months of April, May, June, July, and August, 1880, at prices agreed upon. The petition alleges that the plaintiffs had delivered about 3,000 tons, when, in July, 1880, the defendant would not permit them to deliver any more. The answer denies generally, and adds, by way of equitable defence, that the contract, as set forth in the petition, is not the contract which the parties, or either of them, agreed upon; but that by mistake of the person who undertook to state their agreement in writing, the understood terms were not truly expressed, and terms were made to appear in the writing, which were not intended by either party. The brief of counsel for the plaintiffs presents the two forms of

Digitized by Google

contract, as averred and disputed, in parallel columns, thus: —

"EXHIBIT A" — THE CONTRACT AS EXECUTED.

St. Louis, Mo., April 27, 1880.

The St. Louis Beef Canning Co.:

Gentlemen — We agree to deliver, free of charges, in cars on your tracks at the National Stock Yards, Illinois, eight thousand tons of prime, merchantable ice during the months of April, May, June, July, and August, 1880, at the following prices, viz.: —

For the month of April, $6.00 per ton — 2,000 pounds.

For the month of May, $6.65 per ton — 2,000 pounds.

For the month of June, $7.00 per ton — 2,000 pounds.

For the month of July, $7.00 per ton — 2,000 pounds.

For the month of August, $7.00 per ton — 2,000 pounds.

Very truly yours,

Jas. A. Smith & Son.

Accepted April 27, 1880, it being understood that the company use no ice purchased of other parties during the above period until the eight thousand tons are exhausted, provided Messrs. J. A. Smith & Sons make no default in deliveries.

The St. Louis Beef Canning Co.
By A. S. Patterson, *Secretary.*

DEFENDANT'S VERSION OF CONTRACT.

St. Louis, Mo., April 27, 1880.

St. Louis Beef Canning Co.:

Gentlemen — We agree to deliver, free of charges, in cars on your tracks at the National Stock Yards, Illinois, such an amount of ice as you may want during the months of April, May, June, July, and August, 1880, not exceeding in all 8,000 tons of prime, merchantable ice with the privilege on your part of taking any portion of said amount during either of said months; and for such amounts thereof as you shall accept you are to pay the following prices per ton on deliveries made during the respective months as follows: —

In the month of April, $6.00 per ton of 2,000 pounds.

In the month of May, $6.65 per ton of 2,000 pounds.

In the month of June, $7.00 per ton of 2,000 pounds.

In the month of July, $7.00 per ton of 2,000 pounds.

In the month of August, $7.00 per ton of 2,000 pounds.

Very truly yours,

Jas. A. Smith & Sons.

Accepted April 27, 1880, it being understood that the company use no ice purchased of other parties during the above period until the 8,000 tons are exhausted, provided Messrs. J. A. Smith & Sons make no default in delivery.

St. Louis Beef Canning Co.
By A. S. Patterson, *Secretary.*

Digitized by Google

The defendant prayed that the contract be reformed in conformity with the understanding of the parties, as stated. The plaintiffs replied, denying the allegations of new matter in the answer.

When the cause was called for trial, the court denied the plaintiffs' application for a jury, and required the plaintiffs, against their objections, to assume in the outset the burden of proof on the question of damages sustained. Exceptions to these rulings were duly saved. The court heard the testimony, and rendered a final decree for the defendant.

A glance at the terms of the contract, as stated by the defendant, will suffice to prove that, if such was the real agreement between the parties, there is no ground for any recovery by the plaintiffs. The defendant, in that case, had a right to stop the delivery at pleasure. The whole controversy is thus made to turn upon the truth of the equitable defence. If that defence be maintained, there can be no propriety in inquiring about the plaintiffs' damages. If, in this state of affairs, we must adopt the language, as well as the effect, of the decision in *Freeman* v. *Wilkerson* (50 Mo. 554), "the answer of defendant converted this case into an equitable proceeding." Counsel protest vigorously and ably against the recognition of such a transformation. To admit it, is to revive the obsolete distinctions between forms of action, in defiance of codified reform, whose very root and life-giver consists of the declaration that, "There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action." Rev. Stats., sect. 3461.

We do not think that, in the language quoted, or in any elsewhere, our supreme court has ever intended to say that there are now, in Missouri, suits at law and suits in equity, as distinct and differing forms of action, or that one such form may be converted into the other. It is intended only to distinguish between the various sorts of

Digitized by Google

rights which the court may find itself called upon to adjudicate. The pleadings may develope a case in which the right to be enforced is one of easy recognition by the principles of equity, but which the common-law rules ignore, and *vice versa*. The form of action is always the same. But the methods to be employed for reaching the conclusions of justice between the parties may vary, as the right belongs to the one class or the other. Thus, in the case of common-law rights to be adjudicated, the trial by jury is generally, if not always, appropriate, and its natural concomitant, the giving of instructions or declarations of law, attaches as well, when the trial is by the judge, sitting as a jury. But, when employed in the investigation of equitable rights, the court may, or may not, have the aid of a jury according to circumstances. If the equitable case be one not proper for a jury trial, or, if no jury be demanded, and the parties submit the controversy to the judge, who will then be sitting as a chancellor, instructions or declarations of law will not be proper, and, if given, will not be reviewable on appeal. The last mentioned alternative expresses the precise condition in *Freeman* v. *Wilkerson* (50 Mo. 554), and the conclusion there followed, as we have stated it. This is all that the case decides.

We take the decision, as it is uttered, and can find no authority for extending it over another field, and making it applicable to the right of trial by jury, which was not before the court.

The truth is, in the present state of our law, as we understand it, the right of trial by jury is only remotely related to the distinction between legal and equitable rights, and is never made wholly dependent upon it; unless, perhaps, where the plaintiff's petition asks exclusively for equitable relief, which can not be given in a judgment for money, or for specific real or personal property. Our present statute on the subject is so plain and unequivocal, that its interpretation needs not the least aid from the ancient distinctions

Digitized by Google

between forms of action, or the origin and development of the trial by jury. "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered, as hereinafter provided." Rev. Stats. sect. 3600. The word action does not mean the defence set up, nor the issue developed in a cause. It means, according to the books, "the legal demand of one's just rights," in other words, the plaintiff's suit. The law might seem more symmetrical, if the practical test were adapted to the issue, or to the right in controversy, however developed by the pleadings. But the language used must be construed to one obvious effect, to wit, that, if a plaintiff comes into court demanding a sum of money, or specific real or personal property, he is entitled to have a jury pass upon the facts which affirm or deny his right, whatever form of resistance may be offered by the adversary.

In the decisions of the supreme court, and of this court, we find nothing that casts a doubt upon the correctness of this conclusion. In each of the next following cases the plaintiff asked for a money judgment, and was met by an equitable defence. It was held that a trial by jury was the proper method. *State ex rel.* v. *Meagher*, 44 Mo. 356; *Peacock* v. *Nelson*, 50 Mo. 256; *Kitchen* v. *Railroad Co.*, 59 Mo. 514; *Wolff* v. *Schaeffer*, 4 Mo. App. 367. In the first mentioned case, Currier, J., remarks that, "The change of system, in this instance, leads to a change of the trier of the questions of fact involved, substituting a jury in place of a chancellor." *Weil* v. *Kume* (49 Mo. 158), is the only case that we find in Missouri, wherein an action for the recovery of money is held as proper for the exclusion of a jury, on the ground that the petition was in the nature of a bill in equity. Its authority is completely annulled by both the earlier and later decisions of the same court, and its conclusion is in manifest conflict with the terms of the

Digitized by Google

statute, which must have been overlooked. *Ragan* v. *McCoy* (29 Mo. 356), was an action upon a money demand, in which the plaintiffs prayed also for a discovery. It was held that the whole case should have been left to a jury, notwithstanding the prayer for equitable aid.

The New York statute, in the particular we are considering, is identical with ours. It seems to be well understood in that state, that the test whereby the question of jury or no jury must be determined, is the action, and not the issue. 2 Nash. Pl. & Pr. 961.; *Davis* v. *Morris*, 36 N. Y. 569; *Pitcher* v. *Hennessey*, 48 N. Y. 415; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. 283.

We are of the opinion, therefore, that the court erred, in the present case, is refusing a trial by jury, upon the plaintiffs' demand.

It is argued for the plaintiffs that the court erred further in sustaining the equitable defence, because no proper case was presented for the relief granted, and no compensation was provided for the party against whom the decree was rendered. There is nothing in this point. It is, of course, necessary to the reformation of a contract, on the ground of mistake, that the correction sought shall make it conform to the original, or rather, the final intention of both parties, at the time of their agreement. But this is no more than the defendant claims.

The defence is, that both parties agreed upon a certain contract, and that the mistake consisted in making the writing show a different one. The correction asked for is, that the writing be now made to show what the parties in fact agreed upon. The court found the facts proved, as alleged by the defendant, and decreed accordingly. As to the matter of compensation to the losing party, the authorities cited have no application. They refer to cases where a mistake is made by one party only, and the other who has made no mistake, and has been guilty of no fraud, misrepresentation, or unfairness, must be placed as nearly as

Digitized by Google

possible in the position to which he has a right to suppose himself entitled. No such case is set up here, nor is it pretended that any such was shown in evidence.

The judgment is reversed, and the cause remanded. All the judges concur.

S. A. RIDER, Appellant, v. WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Respondent.

January 2, 1884.

1. COMMON CARRIERS — DAMAGES. — A railroad company which, with knowledge of its contents, takes upon a freight car, as passenger's baggage, a sample trunk containing valuable merchandise, is liable for its loss while in transit.
2. —— The company is not liable as a carrier if the passenger, finding that his trunk is too large to be put in the caboose, on his own account and responsibility, and not as a delivery to a common carrier, places it in a box car, the company having no knowledge as to the character of its contents.
3. —— EVIDENCE. — Testimony that the trunk was of a size and shape recognized by railroad men as a sample trunk is not conclusive of the company's knowledge that it was not a baggage trunk.
4. —— AGENCY. — Statements subsequently made by agents of the company who were not its agents in the transaction which involved the cause of action, are inadmissible to bind the company.

APPEAL from the St. Louis Circuit Court, ADAMS, J. *Affirmed.*

ROMBAUER & GOLDSMITH, for the appellant: The trunk was accepted as baggage for carriage. The mere receipt of it was an acceptance. — *Prewitt* v. *Han. etc., R. R. Co.*, 62 Mo. 527; *Lauder* v. *Pacific R. R. Co.*, 50 Mo. 346. The conductor was chargeable with knowledge of the nature of its contents. Whart. on Ev., sect. 1243; Whart. on Crim. Law, sect. 725. The defendant is accordingly liable for

Digitized by Google

the loss in suit. — *Ross* v. *Missouri, etc., Co.*, 4 Mo. App. 582; *Stoneman* v. *Erie Ry. Co.*, 52 N. Y. 429; *Waldron* v. *Chicago, etc., Mo.*, 1 Dak. Ter. 351; *Kuter* v. *Michigan, etc.*, 1 Biss. 35. The mere receipt of the trunk by defendant imposed on the defendant the obligation to use diligence, and rendered it liable for a loss occasioned by the gross negligence or malfeasance of its employes. — *Pennsylvania Co.* v. *Miller*, 35 Ohio St. 541; *Michigan, etc., Mo.*, v. *Carron*, 73 Ill. 348. The burden of proving diligence was on defendant. — *Kirby* v. *Adams Express Co.*, 3 Mo. App. 369; *Ketchum* v. *American, etc., Co.*, 52 Mo. 390.

JOSEPH DICKSON, for the respondent: The articles alleged to have been lost were "samples," carried by a traveling salesman, for the purpose of enabling him to make bargains in the way of trade, and were not for the personal use, convenience, amusement, or instruction of the passenger, hence for the loss no recovery can be had in contract, nor in tort, except for gross negligence. — Thompson on Car. of Pass., 511; *Alling* v. *Boston, R. R. & M. Co.*, 126 Mass. 121; *Mich., etc., Co.* v. *Carrow*, 73 Ill. 348; *Hawkins* v. *Hoffman*, 6 Hill, 590; *Strinson* v. *Conn. R. R. Co.*, 98 Mass. 83; *Dunlap* v. *Steamboat Co.*, 98 Mass. 371; Hutch. on Carriers, sect. 685 and cases cited; *Dibble* v. *Brown*, 12 Ga. 217; *Pardee* v. *Drew*, 25 Wend. 459; *Penn. Co.* v. *Miller*, 35 Ohio, sect. 541.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff is a wholesale dealer in jewelry. One of his traveling salesmen, Louis Rosenfield, boarded a freight train of the defendant corporation at Mexico, Missouri, with a trunk containing valuable samples, for transportation to Sedalia, fourteen miles distant. The trunk was placed in an empty box car, which was about the third car forward of the caboose, in which the passenger rode. Upon arrival of the train at Centralia, it was discovered that the trunk had

Digitized by Google

been abstracted from the car. It was afterwards found lying beside the road, between the two stations, broken open, and despoiled of part of its proper contents. This suit is to recover the value of the articles lost. All the events mentioned occurred in the night time. A jury found for the defendant.

As to the evidence, it is sufficient to say that there was testimony tending substantially to establish the several hypotheses contained in the instructions given on either side. The instructions, taken all together, were so framed as to present to the jury the following questions of fact:

1. Did the defendant receive the trunk as a passenger's baggage, knowing at the same time, that its contents were merchandise?

2. Did Rosenfield, upon being informed by the conductor that the trunk was too large to be got into the cabbose, ask for permission, and, upon his own account and responsibility, and not as an act of delivery to a common carrier, place the trunk, himself, in the box car from which it was stolen?

If the first of these questions was to be answered in the affirmative, and the second in the negative, the plaintiff should recover. If these answers were to be reversed, respectively, the verdict should be for the defendant. It seems to be conceded that these were the proper issues to be determined by the jury. The plaintiff's criticisms upon the instructions apply rather to the language than to the substance. It is not disputed that Rosenfield paid his passenger fare, and that, according to a rule applicable to freight trains, the trunk was not checked.

Let it be conceded that the defendant received the trunk as the personal baggage of the passenger. If, nevertheless, it was not personal baggage, but was a mere package of merchandize, and this fact was not known to the defendant's servants who received it, there can be no pretence that the defendant is subject to the responsibilities of a common car-

Digitized by Google

rier, for the loss of a passenger's baggage. *Alling* v. *Railroad Mo.*, 126 Mass. 121; *Michigan, etc., Co.* v. *Carrow*, 73 Ill., 348. This seems to have been fully understood by the plaintiff, who made, and still makes every possible effort to fix upon the conductor of the train a knowledge of the contents of the trunk. The conductor, as a witness, testified positively that he did not know what were its contents, or even that it was a sample trunk. He said further that, if he had known of the valuable articles it contained, he would have placed a man to watch it while on the train. The plaintiff meets this by testimony tending to show that the size, construction, and general appearance were of a sort peculiar to sample trunks, and so recognized among railway people. The question is not, whether the conductor ought to have known what other people generally knew about sample trunks, but whether he did in fact know, or had information from the passenger, that this particular trunk contained valuable merchandize, and not clothing or other personal accessories of convenience to the traveller. This question was presented as fairly as possible to the jury, and their verdict is conclusive against the conductor's knowledge, in so far, at least, as the question may be considered in this court.

Plaintiff complains that the instructions given were faulty, in that they ignored the question of liability for gross negligence or malfeasance by the defendant's servants. If any legitimate ground of recovery was omitted from the instructions, it was for the plaintiff to ask for one suited to the occasion. It is never the court's duty, in a civil case, to give instructions that are not asked for. The plaintiff asked for no instruction that was not given.

Objection is made to hypotheses contained in the defendant's instructions to the effect that, if "the trunk could not be placed in the caboose of said train, because it was too large to enter the door," etc., on the ground that there was no evidence to support them. Rosenfield, in his testimony,

Digitized by Google

said: "I asked the conductor to put it (the trunk) in the caboose, and he said he could not do it, that there were no side doors." The conductor testified: "He (Rosenfield) wanted to know if I could take his trunk, and I said we could not load it, as we had no side doors in my car. Q. How are caboose cars built? A. Some have side doors, and some have not. Q. When they have no side doors, what means of entrance have they? A. Rear end doors. Q. When you said you could not take it, what did he say? A. He wanted to know if he could put it in a box car, and I told him, yes." While this testimony may not contain the exact words used in the instructions, it certainly presents the same material facts, and no more is required to sustain a hypothetical instruction. The testimony clearly shows the existence of physical obstruction in the way of putting the trunk in the caboose, and not that it was sent to the box car from mere willfulness or negligence of the conductor. This was the only material inquiry in that connection, and the instructions submitted it to the jury in substantial accordance with the testimony. It would appear from the conductor's statements that Rosenfield himself recognized the physical difficulty or impossibility of putting the trunk in the caboose, and therefore asked leave to put it in a box car. We see no reason why the jury might not fairly infer from these facts, the case put to them in the instructions.

The court refused to allow the plaintiff to prove certain statements made by officers of the defendant in St. Louis, after the loss complained of, having reference to the circumstances of the loss. There was no error in this. Those officers were not the servants or agents of the corporation in the matter or transaction which involved the cause of complaint, and could not bind the defendant by any admissions they might make.

We think the case was fairly tried, and that nothing appears in the record to justify the demand for a reversal. All the judges concurring, the judgment is affirmed.

Digitized by Google

14 534
178 574

WILLIAMSON-STEWART PAPER CO., Appellant, v. WILLIAM BOSBYSHELL ET AL., Respondents.

January 2, 1884.

1. AGENCY — IMPLIED POWERS OF ATTORNEYS. — An attorney may by virtue of his implied powers, bind his client by a contract for the printing of briefs for use in an appellate court.

2. —— An attorney may make his clients jointly liable for the printing of briefs when the expense to each client is not thereby increased.

3. PRACTICE-EVIDENCE — The printer need not show, in an action on such a contract, that the number of briefs printed was no greater than the number required to be filed in the cause.

4. PRESUMPTIONS. — In such a case the courts will not presume that the cost of printing ten copies of a brief is greater than the cost of four copies.

5. CONTRACTS are, under the statute, joint and several.

APEAL from the St. Louis Circuit Court, THAYER, J *Reversed and remanded*

A. MOORE BERRY, for the appellant: An attorney, by virtue of his retainer and general control over the cause, has the power to order briefs printed, and his client will be liable for the expense. — *Weisse* v. *New Orleans*, 10 La. Ann. 46; Weeks on Attorneys, 379; Wait's Actions and Defences, 438. An attorney at law has authority, by virtue of his employment as such, to do, in behalf of his client, all acts, in or out of court, necessary or incidental to the presentation and management of the suit, which affect the remedy only, and not the cause of action. — *Moulton* v. *Bowker*, 115 Mass. 40. For further illustrations of this rule see: *Clark* v. *Randall*, 9 Wis. 128; *Nelson* v. *Cook*, 19 Ill. 453; *Gorham* v. *Gale*, 7 Cow. 744; *Union Bank* v. *Geary*, 5 Pet. 113; *Newberry* v. *Lee*, 3 Hill, 523; *Ostrich* v. *Gilbert*, 9 Hun, 245; *Jenny* v. *Delesdernier*, 20 Me. 191. An attorney is vested with reasonable discretion in the selection and use of the means to accomplish the object of his employment; and if the means enployed are such as

Digitized by Google

are customary or usual, or such as are proper under the circumstances of the case, the attorney will be held to have acted with reasonable discretion in the selection of such means, and his acts will be binding upon his client. — *Schcregge* v. *Bishop* (Minn.), 13 N. W. Rep. 194.

JOHN O'GRADY and W. C. JONES, for the respondents.

BAKEWELL, J., delivered the opinion of the court.

This action was begun before a justice of the peace.

The statement of the cause of action was as follows: —

WILLIAM BOSBYSHELL AND JNO. C. H. D. BLOCK.

As per order of MASON & GORDON, Attorneys,

To PIERCE BROS., *Dr.*

To printing 90 pages of brief at 70 cents	. . . .	$63 00
Case No. 917. N. J. Fairchild *v.* Masonic Hall Association, Wm. Bosbyshell, *Appellant.* Case No. 887. James J. Scanlan *v.* Masonic Hall Association, J. C. H. D. Block, stockholder, *Appellant.*	St. Louis Court of Appeals, October Term, 1877.	

This paper was indorsed as follows: —

"Messrs. Block & Bosbyshell, please pay the within account to Williamson-Stewart Paper Company.

"PIERCE BROS."

"For value received, we hereby assign, sell, and transfer the within account to Williamson-Stewart Paper Company.

"PIERCE BROS."

ST. LOUIS, March 2, 1882.

On trial anew, in the circuit court, the court, at the conclusion of plaintiffs' case, instructed the jury that, on the evidence, plaintiffs were not entitled to recover, and there was a verdict and judgment accordingly.

S. B. Gordon for the plaintiffs, testified to the following effect: He is, and was, in 1877, an attorney at law,

Digitized by Google

and a member of the law firm of Mason & Gordon, which firm was employed by defendants to defend the suits of Fairchild against Bosbyshell, and Scanlan against Block, which were suits against defendants, as stockholders of the Masonic Hall Association, and were heard together in the St. Louis court of appeals. After the cases were in the court of appeals, witness employed Pierce Bros. to print a brief in those cases. Witness made a definite contract as to price, etc., the exact terms of which he does not recollect. The briefs were printed and delivered according to the terms of the contract, and were filed and used in the cases in the court of appeals. There were twenty-six other cases against the stockholders of the Masonic Hall Association which were submitted with the Bosbyshell and Block cases, and in which this brief was used. The witness made out a statement of all the fees and expenses in all these cases, and then apportioned them equally among the defendants in the different suits — twenty-eight in all — and presented bills in favor of Mason & Gordon, for these different proportions, to the different defendants in these cases. Block and Bosbyshell, and some others, paid up their proportions to the attorneys, but no part of the money thus collected was ever paid over to plaintiffs or to Pierce Bros. The briefs were not printed specially for these defendants, but for counsel, to be used in all the cases. The witness had no special authority from either of defendants to have these briefs printed.

Pierce, on behalf of plaintiffs, testified as follows: "I am a member of the firm of Pierce Bros., printers. About January, 1878, Mr. Samuel B. Gordon told me that he wanted me to make a bid on a brief. I went to see him about it, and, on examining the manuscript, found that the brief would be quite a long one, and made him an offer to print it for seventy cents a page. He said, that, before going further, he wanted it distinctly understood that the payment was not to come out of the pockets of Mason &

Digitized by Google

Gordon, but that his clients were perfectly good men. I asked him who his clients were, and he said William Bosbyshell and John Block. I told him that was all right; they were perfectly good, and that it was usual to look to the client for pay for that kind of work. He told me to deliver the briefs to him, and he would see that his clients paid — that I might have to wait a little while, but it would be all right; I told him that was satisfactory. He then gave me the copy, and we printed the briefs and delivered them to him. Afterwards we assigned the account to the plaintiff, the Williamson-Stewart Paper Company, for value. The account has not been paid. The brief printed was ninety pages long, and, according to the contract I made with Mr. Gordon, it is worth sixty-three dollars, no part of which has been paid."

The plaintiff also introduced in evidence Rule IX. of this court, which is as follows: —

"Counsel on either side, in any case, shall prepare and file four copies of a brief, containing, first, a clear and concise statement of the pleadings and facts shown by the record; second, an enumeration, in numerical order, of the points or legal propositions made or relied on, accompanied by a citation of authorities supporting each proposition. To this may be added an argument, or statement of reasons, illustrating the application of the authorities cited, or otherwise conducing to the conclusion advocated by counsel. Every such brief must be on file at least one day before the cause is called for hearing."

There was no other testimony in the case.

The rule just set out has not been complied with by counsel for respondent in the present case, who has said nothing to us, either orally or in writing, in support of the action of the trial court in directing a verdict for defendant upon the above evidence.

It seems to us that the plaintiff made out a *prima facie* case, and was entitled to recover upon the testimony.

Digitized by Google

In the absence of any suggestion from counsel for respondent, we are left to conjecture what can be reasonably urged against plaintiffs' right to recover in this action.

We conceive that it is denied, either on the ground that an attorney can not, without express authority, make his client liable for the expense of printing briefs; or that he can not make two clients jointly liable for one brief, to be used in their two separate cases; or, that he can make his clients liable only for the expense of printing just so many briefs as may be required by the rule of court.

1. It is quite well settled that an attorney has authority, by virtue of his employment as such, to do, on behalf of his client, all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only. *Moulton* v. *Bowker*, 115 Mass. 36. We have no doubt that this includes the power to have printed, at the charge of his client, such briefs or arguments as the attorney may judge advisable for the more convenient presentation of the case in an appellate court. It is a proceeding in the progress of the suit which the attorney may be supposed to consider beneficial to his client. We believe that it is the general understanding and common practice at this bar to have briefs for this court printed. Great inconvenience, and even loss, to clients might ensue, if the attorney were to be compelled to resort to his client at every turn to know whether or not he is willing to incur this or that expense involved in a proper protection of his interests in the lawsuit in hand. It may be that an attorney may make his brief unnecessarily long; it may be that his brief may even do harm to his client rather than good, and thus the client may be put to useless expense; but an attorney may, in many conceivable cases, through indiscretion, negligence, or ignorance, so abuse his trust as to render his client liable for heavy damages; yet such conduct

Digitized by Google

is not to prejudice one who did not select the attorney, and who is entitled to regard him as the agent of his client. *Jenny* v. *Delesderneier*, 20 Me. 183. It has been expressly held in Louisiana that the right of counsel to have their arguments or briefs printed at the expense of their clients is within the scope of their implied power. — *Weisse* v. *City*, 10 La. Ann. 46. It is true that the rules of this court do not require that briefs should be printed. But it is usual to print them in all cases of any importance where the briefs are long; and it is obvious that, in the case of a long brief, of a hundred pages or so, as in the case at bar, the expense of printing four copies can be very little, if at all, greater than the expense of having four copies made out in a clerkly hand.

2. But it may be said that the attorney can not make his clients liable for the printing of more copies of a brief than are required in such cases by the rules of practice, and this is, indeed, said in the Louisiana case just cited. The case was this: In an action in which the city of New Orleans was plaintiff, the attorneys for the city, without consulting their client, called upon the city printer to print their brief. The printer printed over three hundred copies; two hundred and fifty of these were printed at the mayor's suggestion, but without any authority from the city. No agreement was made in relation to the price of the work. The charge was for three hundred and twenty-six pages at $3.00 per page, or $978. There was judgment for $651.50, and the printer appealed. The supreme court affirmed the judgment, saying that the judgment of the district court had done ample justice to the plaintiff. Whatever may be said in the opinion, a reference to the case itself shows that it is no authority for the proposition that the attorney can bind his client for only just so many copies of his brief as the rule of the court requires.

In the present case it does not appear how many copies were printed. No inquiry was made as to that by defend-

Digitized by Google

ants. We do not know why it ought to be presumed that an unnecessary number were printed. The charge of $63 for printing ninety pages, certainly does not raise any presumption that there was a great multiplication of copies. Mr. Gordon says that the briefs were filed and used in the two cases in which defendants were parties. He says that there were twenty-six other cases submitted with these cases, in which the brief was *used*. But he does not say that it was *filed* in these other cases. It is manifestly improbable that four copies of the same brief were filed in each one of these cases, all argued and submitted together. It may well be that a brief statement and reference to the briefs filed in these two cases was filed in the other twenty-six cases; or that, the cases being submitted together, counsel, according to the usual practice in such circumstances, asked and obtained leave to submit the twenty-six cases upon the briefs filed in the two cases upon which the others depended. It is no fair inference from the testimony that, because there were twenty-eight cases, there were four times twenty-eight, or one hundred and twelve copies of the brief filed in this court. We are of opinion that it was not necessary for plaintiff, in order to recover, to show affirmatively that just eight copies of the brief, no more and no less, were printed for the two cases to which defendants were parties. Had it appeared that an unreasonably large number of briefs for use in the two cases had been printed, and had nothing appeared from which it could be ascertained how much should be deducted for the excessive copies, we could have understood the theory upon which the court held that plaintiff could recover nothing.

3. Defendants, though parties to distinct suits, are made jointly liable for the briefs, which, from the character of the litigation, were equally available, and were actually filed, in either suit. We see no injustice in this. We can not conceive how either of the defendants can be prejudiced by this. If the liability was joint, it was, under our statute, a several

liability. The fact that all the parties, defendants in the twenty-eight stockholder suits, were made jointly liable for printing the briefs did not deprive plaintiff of a right of action against any two of them. Rev. Stats., sect. 3467. The obligation being a joint and several one, the creditor party might, at his option, proceed against one, or all, of his debtors. It does not appear that Bosbyshell's briefs cost him any more, because they were also the briefs of Block, than they would have cost him if they had been the briefs in his case alone. Had the contract been made for Bosbyshell alone, it can not be said, in view of the possibility of accidents, that ten or twenty briefs would have been an unreasonable number to print, though the rule requires only four to be filed. It is quite proper that there should be an extra copy or two for the convenience of counsel on either side, or for future use in the possible contingency of a protraction of the litigation, a further appeal, or a reversal of the judgment. We may take judicial knowledge of the process of printing. It is evident that the main expense is the setting up of the type, and that, in setting ninety pages of matter for a brief, it must be almost a matter of indifference whether the impression is repeated five times or ten, or even twenty times. We are of opinion that the attorney had authority to bind his client to pay for the printing of a reasonable number of briefs. Had it been the case of one client, we should not think twenty copies an unreasonable impression, though only four copies need be filed. There is nothing to show that more copies were printed than would have been reasonable had there been only one case.

We can not agree with the learned judge of the circuit court in holding that the plaintiff was not entitled to go to the jury with the evidence introduced, and we think that the judgment should be reversed and the cause remanded. It is so ordered. All the judges concur.

Digitized by Google

MARY BURKE ET AL., Respondents *v.* MARY DALY ET. AL., Appellants.

January 2, 1884.

1. PARTITION — ATTORNEYS — FRAUD — BURDEN OF PROOF. — The burden is on a purchaser at partition sale, who was also the plaintiff's attorney in the partition proceeding, to show that the sale was as advantageous as could by due diligence have been made.

2. —— Such a sale will be set aside where, by the negligence of their attorney, the minor defendants were not represented at the sale, where no effort was made to secure bidders, and where the property did not sell for its reasonable value.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Reversed and remanded.

GARESCHÉ & HOBEIN, for the appellants: It is necessary to the validity of partition sales, that there should be the utmost good faith on the part of all persons concerned. — *Goode* v. *Crow*, 51 Mo. 241; *Stoffel* v. *Schroeder*, 62 Mo. 149; *Thornton* v. *Irwin*, 43 Mo. 163; *Grumley* v. *Webb*, 44 Mo. 448; *Rea* v. *Copelin*, 47 Mo. 82.

J. P. VASTINE, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This is an appeal from an order of court affirming the report of sale of a commissioner in a proceeding in partition.

The parties to the partition suit were Mary Burke, who with her husband were plaintiffs, and the four minor children of Mary Burke, who were defendants. The decree found Mrs. Burke and her children entitled each to an undivided fifth of the property, and ordered it to be sold as insusceptible of division. The terms of sale were one-half cash, the balance in one year, with the privilege of paying all cash at a discount of two per cent. James S. Farrar

Digitized by Google

was appointed special commissioner to make the sale. Joseph P. Vastine was attorney for plaintiffs, and Alexander J. P. Garesché, guardian *ad litem* of the minor defendants. The decree further ordered that, as Vastine had paid $397.10 to redeem the property from unpaid taxes, this be taxed as costs in favor of Vastine.

The property was sold at the court-house door, at public outcry, to the highest bidder.

Lot 22 of Schaumberg's subdivision, fronting twenty-five feet on Benton Street, was sold to Patrick Burke, trustee of plaintiff, for $1,225.

Lot 6 of Ridway's Addition fronting twenty-five feet on Filmore Avenue, was sold to Vastine at $13 a foot, or $325 for the whole.

Lots 6 and 7 of block 6 of Page's Addition, fronting fifty feet on California Avenue, were sold to Vastine at $6 a foot, or $300 for the whole.

After testimony had been heard on the exceptions to the report of sale, it was stipulated that the bid as to the Benton Street property be increased to $1,500, and that as to the Filmore Avenue property to $362.50, and that the exceptions be withdrawn as to those lots.

Exceptions were filed by Garesché, as attorney of defendant, Mary Daly, and guardian *ad litem* of the other defendants. The grounds of exception were, that the commissioner was not sworn; that due notice of the sale was not given, and that the property was sold at prices greatly below its true value; counsel for plaintiffs being purchaser of a portion, and plaintiff's husband the purchaser of the rest of the property.

On the hearing, the only witnesses examined as to the California Avenue property were Greffert and Reed — Greffert on behalf of plaintiffs, testified that he bid $6 a foot for the California Avenue property, and that it was fairly worth only $8 a foot; that he was a real estate agent of many years' experience, and owned prop-

Digitized by Google

erty in the neighborhood, and that he remembered no bidders but Vastine and himself. Reed testified that the California Avenue property was below grade in the rear, and fairly worth not to exceed $7 a foot, and it would be difficult to sell at that price. He was not cross-examined. An attachment was out for Joseph T. Donovan, who had been summoned for defendants, the exceptors. As he was not brought in at the close of the testimony in support of the sale, the trial judge said that he would sit until late in the evening to await the arrival of the witness, as he was advised that he could easily be found. Counsel for exceptors said that it was impossible for him to remain in court, and the matter was then taken under advisement, and the exceptions were overruled and the report of sale confirmed. The defendants then moved to set aside the affirmance of the report of sales on the the grounds alleged in the former motion. In support of this motion, affidavits of Alexander J. P. Garesché and of Joseph T. Donovan were filed. These affidavits were lost. The original papers in the case were mislaid pending the former motion. All this caused great delay. A year had elapsed from the report of sale when the trial court notified the parties that it would hear oral testimony on the motion to set aside the affirmance.

Garesché testified that defendant, Mary Daly, was now of age; that he was acting in the matter purely from charity; that the sheriff, in advertising such sales, always allows a day additional for every intervening Sunday; that had the commissioner done so in this case, Garesché would have attended the sale; that he learned of the sale, for the first time, and to his dismay, on the afternoon of the sale, or on the next day. Garesché further testified that he knew nothing of the value of the property, but had employed Donovan to examine it. The rest of his direct evidence was as to the loss of the papers, except that he said that, had he known of the sale, he would have taken extra measures to secure bidders

Digitized by Google

by mailing the advertisements to persons shown by the assessor's books to own adjoining property. This witness stated that he did not know the witness Reed, but had since learned that he was a man whose business was loaning money at usurious rates; and that the witness Greffert was a real estate agent and buyer of tax-titles; and the witness stated that, in his opinion, such men were not fair judges of the value of real estate.

Joseph T. Donovan testified that he was a real estate agent of twenty years' experience. The California lots were worth $15 a foot. He examined the property for Garesché a year ago. It was then worth a dollar or two less per foot, but it could be sold at the time when witness gave his testimony at $15 a foot.

Vastine and Garesché then testified as to matters in regard to the delay in hearing the motions. Vastine also said that he bid on the property only to save it from sacrifice, and that the mother, and all the defendants except the oldest, desired the sale confirmed.

The court then overruled the motion to set aside the confirmation of the sale.

There is nothing in the point as to the affidavit of the commissioner, and it is not urged here. The objection to the advertisement seems to be equally untenable. The notice was published in twenty issues of a daily paper, the first insertion being on the 9th of June, and the last on the 1st of July. The sale was made on Monday, 3d of July. Full twenty days intervened between the first publication and the day of sale. The omission to publish on the intervening Sundays is immaterial, unless it appears that the paper had a Sunday edition, and this is not pretended. *German Bank* v. *Stumpf*, 73 Mo. 311.

The statute provides (Rev. Stats., sect. 3395) that every special commissioner appointed under the partition act shall be "governed by the same rules applicable to sheriffs in

Digitized by Google

like cases;" and that the sheriff (sect. 3373) shall "be governed by the same regulations provided by law for sales of real estate under execution, notice being given by the sheriff as provided by law for such sales." The execution law provides that the sheriff shall have "previously given twenty days' notice of the time and place of sale." Sect. 2380. There can be no doubt that an advertisement, otherwise regular, published in a daily paper for twenty successive secular days, gives twenty days' notice of the sale. *German Bank* v. *Stumpf*, 73 Mo. 314; 10 Mo. App. 457. Mr. Garesché swears to a custom of the sheriff of allowing an additional day for every intervening Sunday. If the sheriff does so, he is not bound by law to do so, and such a custom is not a "regulation provided by law," by which the commissioner must govern himself. It appears, however, that the commissioner, in this case, did allow in his notice for every intervening Sunday, since he actually gave, not twenty, but twenty-four, days' notice of the sale. The advertisement, as appears by the affidavit of the printer, was inserted on twenty successive secular days, — that is, on every day from the 9th of June to the 1st of July, both inclusive, except the 11th, 18th, and 25th of June, which seem to have been Sundays. The notice, if we exclude the first day and include the last, according to the rule for computing time in such a case as this, was first inserted twenty-four days before the day of sale, which was the 3d of July, between which day and June 9th there were just four Sundays. Rev. Stats., sect. 3126; *Patchin* v. *Bonsack*, 52 Mo. 431; *Kellogg* v. *Carrico*, 47 Mo. 159. Mr. Garesché says he knew nothing of the sale until the afternoon of the 3d, or perhaps until the next day, which was the 4th, a *dies non*. If he had no time for making his customary examination in the assessor's office, and giving the notice which he testifies that he habitually gives to adjoining property holders in such cases, this is wholly attributable to the fact

Digitized by Google

that he made no inquiry about the matter until the twenty-fifth or twenty-sixth day after the first appearance of the advertisement.

The property in question was sold at $6 a foot. According to the testimony of plaintiffs' witnesses, it was worth, on the day of sale, from $7 to $8 a foot, or from $50 to a $100 more than it brought. According to the testimony of Donovan, it could have been sold, when he testified, at $15 a foot, having risen in value $2 a foot since the sale. It is not for us to say, therefore, that there was not evidence from which the trier of the fact may have found that the particular two lots now under consideration were not sacrificed, and that they brought something near to their true value.

The only question, therefore, is whether the sale ought to have been set aside on the ground that the purchaser was the attorney for plaintiffs in the partition suit. And we think that on this ground alone, the sale ought to have been set aside. Not that the attorney for plaintiffs in a partition suit is wholly incapacitated from purchasing the subject-matter of the action, but that, from motives of public policy, the courts watch all such sales with jealous scrutiny, and throw upon the attorney the burden of showing that the bargain is as good as could have been obtained, by due diligence, of any other purchaser. This, we think, was not shown. The other pieces, sold at the same time, were sold so much below their value that, to maintain the sale, plaintiffs and their attorneys were compelled to pay largely more than their bids. It does not appear what diligence was used to obtain purchasers, and it is clear that the very lots in dispute, though not shown to have been sacrificed, were sold for from five-sixths to six-sevenths of what they might have been expected to bring at such a sale. The interests of the minors seem to have been neglected through the confidence of their guardian that the sale could in no case take place before the 5th of July.

Digitized by Google

Fraud does not appear; and we have no suspicion that this sale was tainted with fraud; but we think that the policy of the law is, that a sale of real estate to an attorney representing parties to the litigation, and who, therefore, may be supposed, to some degree, to control or influence the terms and time of sale, can not be sustained, unless there is clear proof that, with every diligence to procure purchasers, no higher price than that bid could have been reasonably obtained.

We are referred to *Grayson* v. *Weddle* (63 Mo. 523), but the case is not in point, since it was an administrator's sale at which, by statute, the trustee may purchase at two-thirds of the appraised value. On the other hand, what is said by the court in *Thornton* v. *Irwin* (43 Mo. 163), shows the policy of the law, in accordance with which we think this sale ought to be set aside.

The judgment is reversed and the cause remanded. All the judges concur.

Ellen Donnelly, Appellant, *v.* Albon C. Hodgson, Administrator, Respondent.

January 2, 1884.

1. **Corporations — Stockholders — Actions.** — To warrant a suit by a creditor of a corporation against a stockholder, under the statute, without joining the corporation, it should appear that the corporation is practically dissolved.

2. —— When the petition alleges a corporate existence, and the evidence shows that the corporation (a bank) had ceased to receive deposits, had not the means and did not intend, to resume business, that it was proceeding to wind up its business, that notes given in settlement to creditors were past due, a proceeding founded on one of these notes against a stockholder can not be maintained under section 745 of the Revised Statutes.

Digitized by Google

3. ——The statute (sect. 736) which authorizes a proceeding by a judgment creditor against the stockholder of an insolvent corporation does not make the stockholder a debtor of such judgment creditor.

4. ——ADMINISTRATION. — A creditor of a corporation not shown to have been dissolved can not have his claim against the corporation allowed against the estate of a deceased stockholder who owned unpaid stock.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

M. MCKEAG and H. I. DARCY for the appellant: It is immaterial, especially, as no point was made on it below, that plaintiff did not expressly declare what section she was proceeding under. Indeed, it is immaterial that she or her counsel may not have known. An erroneous theory, temporarily entertained, will not destroy a case, good on its facts. — *Perry* v. *Turner*, 55 Mo. 426; *Voorhis* v. *Smith, Beggs & Co.*, 11 Mo. App. 111; *Bevin* v. *Powell*, 11 Mo. App. 223; *Scott* v. *Railroad Co.*, 75 Mo. 136; *Hodo* v. *Benecke*, 11 Mo. App. 393; *Iba* v. *Railroad Co.*, 45 Mo. 469. The bank, though not dissolved absolutely, was dissolved within the meaning of the statute giving the remedy to creditors. — Thomp. on Stock., sect. 310; *State Savings Association* v. *Kellogg*, 52 Mo. 583; *State Savings Association* v. *Kellogg*, 63 Mo. 540, *Kehler* v. *Lademann*, 11 Mo. App. 551; Angell & Ames on Corp. (11th ed.), sect. 631; 2 Kent's Comm. (12th ed.), top p. 311. The estate of a deceased stockholder, is a stockholder in the sense of the statute, as it is within the reason of the statute. — *Manville* v. *Edgar*, 8 Mo. App. 324; *Hodgson* v. *Cheever*, 8 Mo. App. 318–321; *Chamberlain v. Transp. Co.*, 44 N. Y. 304; *The State to use, etc.*, v. *Heman*, 70 Mo. 452; *Bailey* v. *Hollister*, 26 N. Y. 116; *Diven* v. *Lee*, 36 N. Y. 302. That the statute, being in derogation of the common law, should be strictly construed is an obsolete claim. — Pollock's Essays, 85; Pom. Sedg. on Con., 259–270; *The State* v. *Darly*, 11 Mo. App. 528–533; *Putnam* v. *Ross*, 46 Mo. 338; *De Witt* v. *Smith*, 63 Mo. 263; *Morgan* v. *Railroad Co.*, 76 Mo. 172. A proceeding in

Digitized by Google

the probate court is a "suit," within the meaning of the statute.—*Kennedy* v. *Phosphate Co.*, 17 S. C. 411; *s. c.*, 43 Am. Rep. 607–612.

HENRY HITCHCOCK, JR., for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This was a proceeding in the probate court, for an allowance against the estate of James B. Clemens, deceased, in favor of a judgment creditor of the Butchers and Drovers' Bank, of which deceased was, at the time of his death, a stockholder. The demand was allowed in the probate court. On appeal to the circuit court, the claim was again allowed. On appeal to this court, the judgment of the circuit court was reversed and the cause remanded. The cause was again tried, and the finding and judgment were for defendant.

The case was tried upon the agreed statement of facts set forth in the former opinion of this court. No other evidence was introduced; but plaintiff offered to prove by B. W. Chambers, President of the Butchers and Drovers' Bank, that "at the time of presenting the claim in the probate court, the Butchers and Drovers' Bank had not the means for, nor did its directors contemplate, a resumption of business at any time; and that it has not now the means therefor, nor do its directors contemplate a resumption of business." Defendant objected to this testimony, and it was excluded by the trial court.

When this case was here on the former appeal, we held, that, the right given by the statute (Rev. Stats., sect. 736), to a judgment creditor of a corporation to proceed against a stockholder of the corporation upon a return of *nulla bona* on the execution, does not make the stockholder a debtor of the judgment creditor, or establish any privity between them; and that, where the corporation is not shown to be dissolved, a creditor of the corporation, as such, can not pursue the estate of a deceased stockholder to have

Digitized by Google

satisfaction of his claim against the corporation out of any sum due to the corporation by the stockholder at the time of his death, for unpaid stock.

It is, however, now contended, that the present proceeding has its warrant in section 745 of the Revised Statutes, which provides, that, "if any company formed under this chapter dissolves, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit." And it is earnestly contended that, from the facts before the court, together with the testimony offered, as stated above, and excluded as irrelevant, a dissolution of the corporation ought to be presumed, for the sake of the remedy against the individual members, and in favor of creditors, accordiug to the doctrine of *Slee* v. *Bloom* (19 Johns. 456), and the cases in this state and elsewhere, in which the teaching of that case has been followed and applied.

There is nothing in the agreed statement of facts on which this cause was first tried, to show a dissolution. It was not stated that the corporation was insolvent; but only that it ceased to receive deposits on July 13, 1877; and that on that day it agreed to pay its existing indebtedness on or before August 1, 1880, and issued to its creditors its promissory notes, payable on that day, one of which notes plaintiff received, on which she obtained judgment against the bank on February 11, 1881. If the corporation was dissolved, its dissolution must have occurred at some date. It is not necessary to fix that date by any proceedings against the corporation on behalf of the state. But some fact must appear, as a transfer of all its assets, its ceasing to own any property, or its being in such a position that, to obtain judgment against it would be futile. It was said by Chief Justice Spencer in *Slee* v. *Bloom*, that, when a corporation has suffered an act to be done by which the end, being, and design of the corporation is de-

Digitized by Google

termined, though it might have capacity to reinvigorate itself, the case had happened when, as regards its creditors, it must be regarded as dissolved. There is nothing to show that this had happened in the present case up to February 11, 1881. Nor does it appear how plaintiff can say that the corporation was then dissolved, for, on that day, she obtained judgment against the corporation. Nor can she say that it was dissolved at the time this proceeding was commenced in the probate court; for the statement of plaintiff's demand against the estate which is the foundation of this action, alleges that, "The said Butchers and Drovers' Bank of St. Louis, is, and at the time of the commencement of plaintiff's suit against it, was, a body corporate, duly incorporated," etc. This statement of the demand is not inserted in the present bill of exceptions, but it appeared in the bill of exceptions on the former appeal, and this is the same demand and the same proceeding. In view of this allegation of plaintiff in her claim, it seems a mere afterthought to invoke the provisions of section 745 as a warrant for this suit against the estate of a deceased stockholder; and we do not think that it can be held that with this statement of the cause of action before him, the trial judge erred in refusing to admit the evidence offered for the purpose of showing that the corporation was actually dissolved when this proceeding was begun.

The statement filed in the probate court as the foundation of this cause of action is omitted from the bill of exceptions now before us, but it sufficiently appears that this is the same case that was here on the former appeal and that the statement is the same there set out at length, and which we then considered and in which it was expressly affirmed by the claimant that the bank in which the deceased held stock was an existing corporation at the time the claim was presented against his estate. Were it otherwise, however, and were the exact nature of the claim hidden from us by the manner in which the bill of exceptions is made up, we would not presume against the action of the trial court in

Digitized by Google

rejecting evidence offered in support of the claim. It is no longer contended as on the former appeal, that, by virtue of the statute (Rev. Stat., sect. 736), giving a judgment creditor a resort against the holder of unpaid stock after a return of *nulla bona*, the stockholder becomes in some sort a debtor of the judgment creditor, and that the statute effects some sort of privity between the two. Learned counsel who is now prosecuting this appeal, and with diligence, learning, and ingenuity endeavoring to make the best of a bad cause, did not frame the original claim, and he argued the case before us orally upon the theory — upon which he also insists in his brief — that, rejecting all inconsistent allegations in the statement, the claim must be considered as a proceeding under section 745 against the stockholder of a dissolved corporation.

We do not, however, see that the testimony excluded would warrant a finding that the corporation was dissolved. There may have been neither the means nor the intention of resuming business as a bank of discount and deposit, and yet the corporation, through its proper officers, may have been engaged in winding up the affairs of the bank. We do not see how a corporation can be at once dissolved and not dissolved. If it is to be held, that, so soon as a banking corporation closes its doors with no hope of re-opening them, the corporation is dissolved, what becomes of the statutory remedy against the stockholders, given only to judgment creditors of an insolvent corporation after a return of *nulla bona*? But we think this is not the law. It was considered in *Slee* v. *Bloom*, that mercantile corporations are of a new and peculiar character, and little more than limited partnerships, in the question of whose dissolution the state is not particularly interested; that to procure a formal sentence of dissolution before instituting suit against a stockholder, is beyond the power of the creditor, and would frustrate the statutory remedy; that the right being perfect, the remedy must be effectual; and

Digitized by Google

that the question of dissolution can be fully litigated in a suit by the creditor against a stockholder, and, that without holding that the corporation had lost all its rights, the dissolution of the corporation might be adjudged, so far as the creditor was concerned, in his action against the stockholder. But, in that case the company was shown to have suffered all its property to be sold under execution, and had performed no corporate act whatever for more than a year. Yet it has been suggested that, in that case, the court perhaps rather supplied a defect in the statute than announced the law as found in the books; and Chancellor Kent said, it should not be carried beyond the precise facts on which the case rested. *Slee* v. *Bloom*, 19 Johns. 456; *Penniman* v. *Briggs*, Hopk. Ch. 300; 8 Cow. 387; *Bradt* v. *Benedict*, 17 N. Y. 99.

The stock subscriptions of the members of a corporation are a part of its assets, a trust fund for the payment of creditors, and the liability of the shareholders may be enforced at the suit of creditors whenever the legal assets are insufficient to satisfy their claims; the creditors have an equitable lien upon unpaid stock. This has often been said, and we do not dispute it. But this does not give the creditor of a corporation a right to proceed at law directly against the stockholder. A judgment creditor may proceed under the statute against a stockholder where his execution is returned *nulla bona*, but this statutory proceeding can not be maintained against the administrator of a deceased stockholder, as we held in *Cummings* v. *Wright* (11 Mo. App. 348), and a creditor may sue any stockholder without joining the corporation, where the company has dissolved leaving debts unpaid, as is provided by section 745 of the corporation law; and by this it is not meant that there must first have been a judgment of forfeiture against the corporation, as has been repeatedly held in Missouri. *Kehlor* v. *Lademann*, 11 Mo. App. 553; *State Sav. Ass'n* v. *Kellogg*, 52 Mo. 583. But we are aware of

Digitized by Google

no case in which it is held that the mere fact that the corporation has closed its doors and does not contemplate a resumption of the business for which it is created, shows a dissolution. In *Moore* v. *Whitcomb* (48 Mo. 544), the railroad had been seized and sold under the lien of the state; in *State Sav. Ass'n* v. *Kellogg* (63 Mo. 540), the corporation had been adjuged a bankrupt in the federal court; and so with the other cases, here and elsewhere. In every case a virtual dissolution was shown, though there was no forfeiture of the franchise by the state. In the case at bar, the plaintiff asserts in his petition that the company of which defendant's intestate was during his lifetime a stockholder, was an existing corporation when her claim was filed in the probate court. She does not suggest its dissolution, and she offers no evidence to show dissolution, beyond a statement by its president that the corporation has not the means of resuming its banking business, and that the directory do not contemplate doing so; and there are facts in evidence from which it may fairly be inferred that the corporation, since it closed its doors as a bank, has been engaged in a compromise with its creditors and in winding up its old affairs.

We see no reason for disturbing the judgment of the circuit court, and it is affimed, with the concurrence of all the judges. Judge THOMPSON files a separate opinion.

Separate opinion by THOMPSON, J.

When this cause was before the court on the former appeal, as I did not agree to the opinion of the court which was rendered, I think it proper to state the grounds on which I concur in the present opinion. I was of opinion that where a person has obtained a judgment against a corporation, and his execution has been returned *nulla bona*, he has such a demand against the estate of a deceased stockholder as may be exhibited to the probate court, and allowed and paid in due course of administration. I can quite well see that this conclusion is not supported by the

Digitized by Google

letter of any of our statutes with which I am acquainted. The creditor can not have an execution against the estate of a deceased stockholder on motion in the court in which his judgment against the corporation was recovered, because that would conflict with the policy of our administration law, which does not grant executions against executors and administrators, but which requires that demands against the estates of deceased persons be exhibited in the probate court, and there classified and paid, in pursuance of a scheme which secures ratable distribution among creditors in case the estate is insolvent. That was what we held in *Cummings* v. *Wright*, (No. 2221, Mo. App.), and that, as I understand the decision, is all we held. We did not hold that a person having a judgment against a corporation, and an execution returned *nulla bona*, had not such a demand against a deceased stockholder as could be allowed by the probate court.

I differed in opinion from the majority of the court in this: My opinion was that the statute giving an execution against stockholders upon judgment rendered against the corporation is remedial in its nature, and is therefore not to be construed narrowly, but so as to advance the remedy intended by the legislature. The legislature intended to give to every creditor of a corporation, under such circumstances, a speedy and summary mode of collecting his judgment out of the property of any stockholder indebted to to the corporation in respect of his shares. The legislature, I think, did not intend that the creditor should have this remedy if the stockholder were alive, but that if the stockholder should happen to die before the creditor should obtain his execution against him, the right to a direct remedy would be cut off. I think the effect of the statute giving to a judgment creditor under such circumstances the right to an execution against the stockholders of the corporation is to make his judgment, for some purpose, a judgment against the stockholders, and I think that it may,

Digitized by Google

for the sake of advancing the remedy which the legislature intended to give, be treated as a judgment against a deceased stockholder, and exhibited, allowed and classed as such in the probate court.

That was the ground of my dissent from the former opinion of the court in this case. I adhere to that opinion still; but I concur with so much of the opinion of the court on the present appeal as holds that we can not treat this proceeding as an independent action by a creditor of a dissolved corporation against one of its shareholders under section 745 of the Revised Statutes. I quite agree with the opinion now delivered, that this corporation can not, upon the present record, be treated as a dissolved corporation. The opinion of the majority of the court upon the former appeal established as the law of the case, a rule contrary to that which I thought ought to have been established. It is, nevertheless, my duty to yield obedience to it, and to say that I do not dissent from what further has been decided in the present opinion.

ANDREW J. CUMMINGS, Appellant, *v.* HENRY RUCKERT, ET AL., Respondents.

January 2, 1884.

EQUITY — CREDITOR'S BILL — CONTRACTS — PUBLIC POLICY — FRAUD.—The profits of a contract obtained in the name of a third person who is pecuniarily irresponsible, can not be subjected to the payment of a judgment previously obtained against the ostensible contractor who had obtained no credit by reason of the contract.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

BROADHEAD & HAEUSSLER, for the appellant: The fact that the transaction being not merely *malum prohibitum*

Digitized by Google

but against public policy bars the interpleader from equitable relief. — *Kitchen* v. *Greenabaum*, 61 Mo. 116. As between parties who enter into a fraudulent combination, no relief will be granted in equity; and this is an equitable proceeding by Stifel against the city. — *Warburton* v. *Alsen*, 1 McLean, 460; *Miller* v. *Marble*, 21 Ill. 152; *Westfall* v. *Jones*, 23 Barb. 9; *Bolt* v. *Rodgers*, 3 Paige Ch., 154. This contract being clearly an imposition on third persons, is void. — Story on Part., sect. 6; 1 Story Eq. Jur. sects. 222–240. — *Davison* v. *Seymour*, 1 Bosw. 88. This contract with the city is a matter of personal trust and confidence and is not assignable. — *Boykin* v. *Campbell*, 9 Mo. App. 495.

GEO. A. CASTLEMAN, for the respondents. The title to the $550 deposited with the city was always in Stifel, and he could claim it from any naked bailee in possession, with or without notice of his title. — *First National Bank* v. *Mason*, 11 Cent. L. J. 244; *Central National Bank*, v. *Connecticut Mutual Life Ins. Co.* 13 Cent. L. J. 410. Stifel's title or right to the fund, is perfect as against the other parties thereto, by reason of the assignment thereof to Stifel by Ruckert, as evidenced by his order upon back of the receipt which operated as an assignment of the entire fund. — *Hydraulic Press Brick Co.* v. *Saville*, 1 Mo. App. 96.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case alleges that plaintiff is a judgment creditor of defendant Ruckert to the amount of $176.66; that ever since the judgment, Ruckert has had no property subject to levy; that Ruckert has deposited with defendant, the city of St. Louis, in the hands of its treasurer, $550, under letting contract No. 698, which money is due and payable to Ruckert; that the city is not subject to garnishment, and that plaintiff has no adequate legal remedy. The prayer is, that the city be required to pay into court,

Digitized by Google

of the fund of $550, so much as will satisfy plaintiff's judgment.

The original defendants, the city and Ruckert, filed general denials. Stifel was made a defendant on his application, and in his interplea, alleged certain facts which will be set out below in the statement of the evidence. Plaintiff filed an answer to the interplea, putting in issue the material facts on which Stifel bases his claim to the fund.

The court found in favor of the interpleader; and the decree was, that, on return of a certain receipt, the city pay the money in question to him. Plaintiff alone appealed.

The bill of exceptions sets out the substance of the testimony as follows: —

Plaintiff offered evidence tending to prove the allegations of the petition as to the judgment and execution against Ruckert, and that he had no property subject to execution. The date of the judgment was August, 1873. It also appeared that Ruckert had several contracts with the city, for large sums, for public work, for the doing of which Stifel was his surety; that in July, 1881, Ruckert, in order to obtain a contract with the city, deposited with its treasurer $550, and took the following receipt therefor: "City Treasury, No. 288 — St. Louis, July 29th, 1881. Received of Henry Ruckert five hundred and fifty dollars, on account of contract deposit, letting number 698, for which I have given quadruple receipt. J. S. Merrell, Treasurer." Indorsed: "City of St. Louis, J. S. Merrell, Treasurer, pay the amount for which the within is receipt, to Philip F. Stifel. Henry Ruckert." Also, that the said sum was still on deposit with the city when this action was brought; that defendant Ruckert, after said deposit was made, entered into contract and bond with the city, with Stifel as his surety; and that the money is in the hands of the city, to be returned to Ruckert, or as the court may direct.

Digitized by Google

On behalf of the interpleader, both Stifel and Ruckert testified to the following state of facts. —

Ruckert and Stifel are brothers-in-law. Ruckert has been in Stifel's employ since 1874, as clerk, collector, and manager. Ruckert and Stifel hold each a power of attorney from the other. Stifel had so many contracts from the city in his own name, that he could not furnish the required bonds for more. He then, in order to become his own bondsman, caused Ruckert to make bids for public work in Ruckert's name. Ruckert would make the required deposit in his own name, and then Stifel would become his surety for the faithful performance of the work. After a contract was obtained, the bills for the work would be made out in the name of Ruckert as contractor. As the contract was not assignable, Ruckert would collect the bills, and turn the proceeds over to Stifel. This had been done in many cases and was still being done by them in the same way. The contract was really Stifel's, and not Ruckert's. Stifel owned the quarry. Stifel borrowed the $550 in question here, from a neighbor, and handed it to Ruckert as his book-keeper to make a deposit. Ruckert made this deposit for Stifel in Ruckert's name, and got the receipt and indorsed it over to Stifel. This action was then brought, after which Ruckert entered into the contract on which he had bid, with Stifel as his surety. Stifel, then went with his receipt to the city, and found when he presented the receipt, that the money had been stopped by this action; the city, on account of this suit, refused to pay the money either to Stifel or Ruckert. Under the regulations adopted by the city in such cases, the money became payable as soon as the contract was let and a satisfactory bond given. The contract was awarded to Ruckert, and he gave a bond satisfactory to the city; immediately thereafter Stifel presented to the city the receipt assigned as above and demanded the $550. The city refused payment to Stifel, on the ground of the pendency of the present suit.

Digitized by Google

This was all the testimony. To the testimony offered for defendants and the interpleader, plaintiff objected that it was incompetent, on the ground that it was against public policy to allow the parties to show a fraud practiced by them on the city to obtain public work in the name of a man who was not the real bidder or contractor, with the knowledge and consent of the surety who was the real contractor, thus fraudulently giving the city no security, and deceiving the officers and the public as to the principal and surety and the deposit.

It will be assumed for the purposes of this opinion, that the statements of Stifel and Ruckert represented the truth of the transaction to which they were parties. The circuit court so found, and this finding is a fair inference from all the testimony. The arrangement is one not improbable in itself. The receipt given by the city to Ruckert is not, of course, conclusive as to the ownership of the fund.

If, by placing the apparent ownership of this fund in the name of Ruckert, Stifel had enabled Ruckert to obtain from plaintiff the credit which led to the creation of the indebtedness which culminated in plaintiff's judgment, it might be urged that it would be inequitable, after the credit had been given on the faith of the apparent facts, to allow Ruckert or Stifel to set up the real truth of the transaction to defeat a recovery of the fund by the creditor, and that there would be an equitable estoppel. But nothing of that sort is pretended.

If the action of the circuit court, in admitting the evidence objected to, was erroneous, it must be so upon the sole ground that the arrangement between Stifel and Ruckert was a fraud upon the city which it would be against public policy to enforce, and which the courts, on this ground, would not give effect to. It is contended by appellant that the case stands as if Stifel, in an action by him, were endeavoring to recover this money from Ruckert. In that case, it is said, Ruckert must be allowed, though a fraudu-

Digitized by Google

lent trustee, to retain the trust fund as against the real owner, because that owner could not arrest his beneficial ownership of the fund except by showing his own fraud.

It is no where expressly stated in the evidence what was the character of the work which Ruckert contracted to do for the city. From the mention of the quarry, it would seem that it was stone work. It may have been the macadamizing of streets; and it is not to be presumed, in the absence of anything more explicit on the subject in the evidence, that the work was of a higher grade, or of a character in which the skill of the contractor was of more importance to the city than it would be in the case of a contractor for street paving.

We are unable to see what public policy requires that a contract for macadamizing the streets of a city must be let to a quarryman, or why the city should not be willing to let a contract for street paving to a man who was never engaged in, and knows nothing of, such work, if he gives good security for performing the work according to contract. It must be a matter of indifference to the city in such a case, that the contractor employs another man to carry out the contract. Such a contract is not let out, like the painting of a picture, with any view to the skill or proficiency in his art or mystery of the contracting party. B is a man of wealth, and desires to make money by the macadamizing of streets. To obtain a contract by which he can utilize his stone quarry in this way, he must make a temporary deposit with the city and give a satisfactory bond. He is unwilling to ask any one to become his surety; and, to obviate this difficulty, B agrees with A that the contract with the city shall be made with A, that B will place in A's hands the money for the required deposit, and will go upon the bond that A must give to the city in the matter. B, meanwhile, is to be the person really interested in the contract, and, as between A and B, the tax bills, when issued, are to belong to B. I can

Digitized by Google

not conceive how the city can be injured by this. I can see that such an arrangement may be of benefit to the city, as increasing the number of possible bidders for street work. If, by such an arrangement, some one is induced to give to A a credit which he would otherwise not have, that person may very well claim that, as against him, neither A nor B shall say that the contract and its profits are not the property of A but of B. But, why should the city complain? The city, in the present case, does not complain. It is willing to pay this money to Stifel or to Ruckert, as the court may direct, so that it is held harmless in doing so. We see no fraud upon the city in the transaction. The city makes its contract with Ruckert, and Stifel becomes his surety. The legal rights of the city are precisely what the papers show them to be. She holds Stifel as surety, and Ruckert as principal. She is not to be supposed to be concerned whether the work is done by Stifel or by Ruckert, so that it is well done; or whether the rock comes from Stifel's quarry or from Ruckert's, provided it comes up to contract; or, whether the money deposited with her until the bond is given, was, as between him and some one else, the money of the depositor or not, provided it was his at the time, in such a sense as not to affect the city's right to hold it as her own so long as she might do so according to the terms of her agreement.

We do not see that the facts in evidence show any fraud upon the city. If the witnesses are to be believed, there was no fraud upon plaintiff, who ought not to take Stifel's money to pay Ruckert's debts, unless Stifel, by giving to Ruckert an apparent ownership, helped him to contract the debt by obtaining a credit which he would otherwise not have had.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

Digitized by Google

14 564
46 51

M. D. LEWIS, ADMINISTRATOR, Appellant, *v.* JAMES LEAHEY, ET AL., Respondents.

January 2, 1884.

1. INJUNCTION — COSTS. — No costs are taxable against the sureties on an injunction bond except such as are occasioned by the injunction.
2. —— Costs of the suit to which the injunction is a mere incident are not taxable on the injunction bond.
3. —— All costs accruing between the granting of a restraining order and its dissolution are properly taxed against the sureties on the injunction bond.
4. —— That the questions on the motion to dissolve the injunction and on the merits of the action are heard together is immaterial in taxing the costs against the sureties on the bond, unless the costs on the question of dissolution are thereby increased.

APPEAL from the St. Louis Circuit Court, THAYER, J.
Reversed and remanded.
HERMANN & REYBURN, for the appellant.
E. A. B. GARECHÉ, for the respondents.

BAKEWELL, J., delivered the opinion of the court.

The original proceeding here, was a bill in equity to compel the execution of a mortgage; the plaintiff also asked incidental relief by injunction, to preserve the *status* of the parties pending the litigation. A preliminary injunction was granted; but, on the trial, the court held, that the bill stated no cause of action, sustained a general objection to all evidence offered in support of it, and dismissed the bill. On appeal to this court, this judgment was reversed and the cause remanded. *Leahey* v. *Leahey*, 11 Mo. App. 413. When the case went back, by consent of parties, the cause was submitted to the court upon the motion to dissolve the injunction and upon the merits; and the court, on this hearing, found for defendants, dissolved the temporary injunction, and dismissed the bill.

Digitized by Google

On hearing upon the motion to assess damage, the jury assessed damages at $250, and judgment was rendered against plaintiff and Robertson, the appellant here, who was the surety on the injunction bond, for that sum and costs. Robertson satisfied the judgment as to damages; and a fee-bill was issued against him for all the costs. Robertson filed a motion to re-tax the costs, which was overruled; and, from this action of the court declaring him liable as a surety on the injunction bond for all the costs of the proceeding, Robertson appeals.

In this case the injunction was merely an incident to the main suit. The damages to be recovered from the surety are not to include anything occasioned by the suit independently of the injunction; and so much of the taxable costs only ought to be assessed as damages against the surety on the injunction bond as were necessarily incurred in procuring the dissolution of the injunction. High on Inj., sects. 1663, 1667.

We think that the costs could neither be increased or diminished by the fact that the hearing on the motion to dissolve and the hearing on the merits were one and the same trial. There is nothing to show that the costs were in any way increased by hearing the merits when the motion was heard, or that any witness was summoned who did not testify as to those matters which were necessarily passed upon in determining the motion to dissolve. It is probable that the motion to dissolve could not be passed upon properly without an inquiry into the merits; and the statute (Rev. Stats., sect. 2717) provides, that, on hearing of the motion to dissolve, the parties may introduce testimony to support the petition and answer.

It is contended by appellant that the injunction was dissolved at the dismissal of the bill, and never revived, and that, for this reason, the surety is liable for no costs after the first appeal. It is true that in England and in many of the states of the union, it is held that an appeal does not

Digitized by Google

revive the injunction, and that, after an order dissolving the injunction, there is no existing injunction pending to the appeal from that order, though bond be given on the appeal. But we think it has been generally recognized by the profession in Missouri that a restraining order dissolved by a dismissal of a bill in equity remains in force pending an appeal from the order dismissing the bill, where the proper steps are taken to obtain a *supersedeas.*

Such has been the view of this court, intimated more than once in passing upon motions, though I am not aware that it has heretofore been necessary to discuss the matter in writing, or to file any opinion to that effect. And this view is supported by the authority of the courts of last resort in many states. In Kentucky it is held, that where an injunction was dissolved on one day of the term, and at a subsequent day of the same term, the case was finally heard, and the bill dismissed, and the complainant prayed an appeal, this superseded the order dissolving the injunction; and it was irregular to issue a writ of *habere facias possessionem* on the judgment pending the appeal. *Yocum* v. *More*, 4 Bibb, 221. In Alabama it is held, that where the bill is dismissed, and, on appeal, this judgment is reversed, and the cause remanded, the case resumes its former position, with the restraining order in force. *Balkum* v. *Heuper*, 50 Ala. 372. In Virginia it is held, that the injunction is revived by appeal. *Turner* v. *Scott*, 5 Rand. 332 In Texas it is held that an appeal from a final judgment dissolving the injunction and dismissing the bill, where a proper appeal bond is given, keeps the injunction in force pending the appeal. *Williams* v. *Powers*, 48 Tex. 141. And the same'rule obtains in Mississippi. *Prentice* v. *Wallace*, 37 Miss. 172. English, Ohio, Massachusetts and New York cases to the contrary, are cited in a note to this last case.

But, whilst we think that all costs occasioned by the proceedings to get rid of the injunction, and all costs and

Digitized by Google

expenses incurred between the granting of the restraining order and its dissolution, were properly chargeable to the surety on the injunction bond, we see no reason why he is to be charged with costs of suit prior to the granting of the injunction. His bond is "to pay all damages occasioned by the injunction." The execution is issued for all the costs of the suit, including clerk's fees for the pleadings and copies, and the fees of the sheriff for the service of summons upon the defendants. These costs are separable from the damages occasioned by the restraining order and were in no wise occasioned by it. The amount may be insignificant when compared with the entire fee bill, but the fact that they are included in the execution against defendant gave him a right to have his motion sustained to re-tax the costs, and we think the court, for this reason, erred in overruling the motion.

Respondents have filed no brief, nor have any suggestions either oral or written, been made to this court on their behalf. For the reasons stated, the judgment is reversed and the cause remanded. All the judges concur.

STATE OF MISSOURI, Respondent, v. CHARLES ROSE, Appellant.

January 2, 1884.

MURDER — INSTRUCTIONS — DELIBERATION — MITIGATING FACTS. — In a trial for murder, when the evidence tends to show that the deceased shook his finger at the defendant and used foul language to him and his companions, that an affray immediately followed in which the deceased shot one of the defendant's companions, and that the defendant stabbed the deceased from behind with a knife, the evidence as to whether the defendant attacked the deceased at all being conflicting, the court in defining murder in the second degree as murder in the first degree with the element of deliberation wanting, should not merely have defined deliberation as meaning "in a cool state of the blood, not in sudden

Digitized by Google

passion engendered by a lawful or some just provocation," but should have declared to the jury as a matter of law, that the provocation as to which there was some evidence, would mitigate the homicide, and should have left it to the jury to decide whether such provocation and passion did in fact exist.

Appeal from the St. Louis Criminal Court, Van Wagoner, J.

Reversed and remanded.

P. N. Jones, for the appellant.

T. B. Harvey, for the respondent.

Bakewell, J., delivered the opinion of the court.

The defendant was convicted of murder in the first degree, for killing one George Ingram, in St. Louis, in April, 1881.

The deceased and the defendant were negroes. The homicide was committed in a bar-room on the east side of Seventh Street, which was a resort of prostitutes. The premises had a bar in front, with a sort of sitting-room for the women and their associates in the rear. This back room was separated from the front by a partition eight feet high with a doorway in the middle. This room had a side door opening into a narrow alley-way which communicated with a yard in which were tenement houses. The yard opened upon an alley between Sixth and Seventh, Wash and Carr Streets, known to the police as Clabber Alley. The deceased was living in concubinage with a woman named Lizzie Denney. The cause of his death was a stab in the right breast. He received on the same occasion four other wounds. One on the face, which was dangerous, but not necessarily mortal, and three in the back which were not dangerous, the knife not penetrating beyond the left shoulder blade.

On the day of the homicide, about noon, deceased was sitting reading a letter in the back room spoken of above. Three or four women were sitting in the room. Defendant

Digitized by Google

Rose, Calvin Emerson, and one Williams, came into the saloon in a boisterous manner, and walked into the back room, and began joking with the women. The woman Denney, the concubine of deceased, entered from the side door. Williams threw his arm round her neck. She said she was sick, and asked to be let alone, complaining that he choked her. Ingram, the deceased, said: "Don't choke the woman; she has been under the care of a doctor." The men who had entered together, then began to talk roughly to deceased, using a great deal of foul language. They drew their knives; but put them up again. Shortly afterwards, one advanced upon Ingram with a chair, and knives were drawn again; but not by deceased. Rose said: "Let us kill the son of a bitch anyhow." Ingram stepped into the bar-room, and got a revolver out of a drawer, and stood there. Emerson followed him, with his knife open, and sprang toward Ingram. Ingram cocked his pistol and warned Emerson off; Emerson still advanced, and Ingram fired, striking Emerson in the head, who fell at once. Ingram then ran to the back room, as if to go to his room in the yard through the side door. Rose was standing in the back room, behind the partition; and, as Ingram passed him without seeing him, Rose caught him by the right arm round the neck, and stabbed him in the left side. Ingram freed himself, after a scuffle in which the stove was upset; Rose caught him again; and Ingram fired, hitting Rose in the hand. Ingram ran out by the side door and Williams cut him in the face. Rose stabbed Ingram again in the back. Ingram then ran into the bar-room, asking for protection.

This is substantially the testimony of the witnesses for the State. From their statements it would appear, that Ingram used no bad language and no threats, from first to last, except that he told Emerson when he pressed upon him, to keep back or he would fire.

One witness for defence testified, that the wound in the

Digitized by Google

heart, which was the fatal wound, was inflicted by Williams, and that Williams cut deceased twice. Another witness for the defence testified, that Rose, after the first shot, ran into the back room; that deceased was "right behind him," pointing the pistol at him; that Rose ran around a pillar in the room, and turned right round on Ingram, and grabbed his pistol, and that Ingram then fired the second time, and Rose stepped back and upset the stove, and that Williams then cut deceased in the back and breast.

One witness for the defence testified, as follows, as to the origin of the difficulty: "Williams got hold of Lizzie Denny. She told him to let her go; she was sick. Ingram raised from his chair and told him to leave that woman be; that was his woman. Emerson spoke, says he: 'We've known this woman as long as you have, I guess.' Williams spoke up; says he: 'She is as much my woman as she is yours.' Ingram spoke, says he: 'You are a God damned liar.' Well then, it was a 'damned lie' and a 'damned son of a bitch,' forwards and backwards, for about a minute, so fast that I could not tell who was cussing the fastest. Ingram spoke out as loud as he could, and said: 'God damn you, I'll show you whose woman she is,' and rushed by me, through the door, and ran behind the counter, and took Mr. Goldsmith's pistol."

Rose on his own behalf, testified that he never saw Ingram before the quarrel; that he knocked the pistol aside when pointed at his heart, to save his life; that he did not stab Ingram, and that he had no knife.

In rebuttal, the state read the testimony of defendant at a former trial, in which he stated that Ingram cursed him and his companions for "fooling" with the woman Denny; that Rose remonstrated that he ought to address Emerson, who also had touched the woman; that deceased then said to Goldsmith, that the black sons of bitches were putting the women about, and that he would permit no black son of a bitch to do so, and made various threats;

Digitized by Google

that Rose offered to apologize for himself and Emerson; and that Ingram came forward, shaking his finger at him; that Goldsmith advised deceased to knock them in the head with a stick of wood; that deceased then got the pistol. Emerson proposed to go home to avoid a difficulty. "I says, all right. So he started out a little before me. If he hadn't started before me, I would have got shot. He started on out. I stayed there a few minutes talking; and the first thing I knew, I heard a shot fired, and I saw George Ingram fire the bullet then. I seen the pistol shot myself; but I did not see where it went to. He come right along to shoot Emerson, and Emerson fell backwards right over that way, with a bullet hit him in the ear. When he shot Emerson, I dodged to run, because I knowed, if he shot Emerson that way, he would shoot me for the same thing, because Emerson hadn't said more than I had. So I ran against this post; and the post knocked me right back to the partition, and then Ingram came through there with the pistol drawn. I aimed to get the pistol and keep him from shooting me. I just got hold of the muzzle and he shot me through the hand. Then Williams came in from the rear way and cut Ingram twice in the back."

In this testimony, also, Rose says that he had no knife. The police officer who arrested Rose, says that he told him that he had had a knife, and cut deceased in self-defence.

There was a testimony tending to show that deceased was of a quiet disposition, and not known to swear or use rough language; and also testimony tending to show that he was of a quarrelsome disposition, and that he had quarrels before about the woman Denny.

The court instructed as to murder in the first and second degrees, and as to the law of self-defence.

In defining murder in the first degree the court defined "deliberately" to mean, "in a cool state of the blood, not in a sudden heat of passion engendered by a lawful, or some just cause of provocation;" and the court told the jury

Digitized by Google

that murder in the second degree is distinguished from murder in the first degree only by the absence of deliberation; and that, if the jury believe from the evidence, "that, at the city of St. Louis, the defendant did, at any time prior to the finding of this indictment, feloniously, wilfully, premeditatedly, and with malice aforethought, strike, cut, stab, wound and kill George Ingram, as is charged in the indictment, and that such killing was not done deliberately, you will find him guilty of murder in the second degree."

It is not necessary to repeat what has been said as to these instructions in the opinion in the case of *The State* v. *Douglass*, delivered with this opinion. The supreme court has very recently said (*The State* v. *Ellis*, 74 Mo. 206): "What words of reproach and attendant circumstances will be deemed a just cause of provocation, and constitute the homicide murder in the second degree, is, in every case, a question of law for the court; and whether the state of mind necessary to make the killing the lowest grade of murder, was, in fact, superinduced by such provocation, and actually existed at the time of the killing, is a question of fact for the jury. And the cases must be decided as they arise, each upon its own facts. Nor do we see the propriety of instructing a jury in every case of murder as to what constitutes that technical heat of passion, or other sudden passion, which will mitigate a homicide when the facts in evidence do not tend to show the existence of any such passion. It is for the court to determine what grade or grades of homicide the evidence tends to establish; and it is the duty of the court to confine its instructions to such grade or grades. Where there is no evidence of such sudden passion, a jury may be instructed as follows: "Deliberately, means done in a cool state of the blood, not in sudden passion engendered by a lawful, or some just, cause of provocation; and the court instructs you that, in this case, there is no evidence tending to show the existence of any such passion or provocation." When there is evidence

Digitized by Google

of such passion and provocation, it will be the duty of the court to declare, as a matter of law, whether the provocation sought to be established is such as will mitigate the homicide, and, if so, to leave to the jury the question whether such provocation and passion did in fact exist." And, elsewhere in that opinion, it is said, that *furor brevis* which, though it does not shut out knowledge or destroy the will, renders a man deaf to the voice of the reason, and to which the common law so far condescends that, if it is produced by a blow, the homicide committed under its influence is reduced to manslaughter, will, if produced by grievous and degrading words of reproach, naturally and justly calculated to produce this passion or excitement, reduce the instant killing in such a state of mind to murder in the second degree in Missouri, because, though there may be premeditation, there is, in such a case, no deliberation.

In the present case there was some evidence of degrading language addressed by deceased to defendant and his companions, and of attendant circumstances well calculated to produce that sudden rage which is held not to be consistent with deliberation. The weight of the evidence as to this was for the jury. But it was not for the court to shut its eye to this evidence, however clearly contradicted; and the court should have told the jury that the provocation and passion, if established by the evidence, did, as a matter of law, reduce what would otherwise have been murder in the first degree to murder in the second degree. It was error, in view of the evidence, to leave it to the jury to determine what was and what was not "just provocation."

In *The State* v. *Andrew* (76 Mo. 101), it is held that evidence of recent threats by deceased against defendant — that his pistol was found under his body after he was killed, — the effort of the principal witness for the state to conceal this pistol, — in connection with the testimony of the accused, warranted an instruction for murder in the second degree. In the present case, the evidence that de-

Digitized by Google

ceased called defendant and his companions "black sons of bitches," the quarrel about the woman, the denunciations of deceased against those meddling with her, the shaking of the finger of deceased in defendant's face, and the sudden and dreadful affray, equally warranted the instruction, and made it essential to tell the jury what "just" provocation is, under our law. It is true that if the jury believed from the evidence that deceased was attacking defendant with a loaded pistol, and that defendant stabbed in front, in necessary self-defence, it would be quite immaterial what other provocation there was; but the whole testimony and the credibility of the witnesses was for the jury alone. They might believe any one witness as against several others, and might accept some statements of a witness and reject others equally material made by the same witness. It was possible for the jury to find from the evidence that defendant was grossly insulted by the deceased at the time of the homicide; that these insults and an attack upon the companions of defendant by the deceased, stirred up defendant to momentary fury, and that, under this impulse, as deceased passed him, and whilst deceased was endeavoring to leave the room, and was meditating no attack upon the defendant, defendant inflicted upon deceased the fatal stab from which he afterwards died. Because of this possible interpretation of facts in evidence, we think that the judgment should be reversed and the cause remanded for failure to give fuller instructions as to murder in the second degree.

Our attention is not directed to any other error in the record, nor have we discovered anything else upon which we think it expedient to comment.

The judgment is reversed and the cause remanded. All the judges concur.

Digitized by Google

APPENDIX.

BEING A STATEMENT OF POINTS DECIDED IN CASES NOT REPORTED.

Affirmed *pro forma* on stipulation. — *Excelsior Manufacturing Company* v. *City of St. Louis*, No. 2613; *Ferguson* v. *Pendleton*, No. 2666; *Bowman* v. *St. Louis Times Company*, No. 2737; *City of St. Louis*, v. *Priest* No. 2773; *Cummings* v. *City of St. Louis*, No. 2775; *City of St. Louis* v. *Lindell Railway Company*, No. 2787; *Howard* v. *City of St. Louis*, No. 2789; *Harrington* v. *City of St. Louis*, No. 2792; *Hutchinson* v. *Gray*, No. 2741; *Ward* v. *Davidson*, No. 2132.

Affirmed for failure to file statement and brief. — *Downing* v. *Kinealy*. No. 2671.

The appeal being frivolous the judgment will be affirmed with ten per cent damages. — *Smith* v. *Smith*, No. 2684; *Crawford* v. *Coquard*, No. 2776.

Appendix. 14n 575 132m 273

Affirmed on authority of *Dyer* v. *Krackauer*, *ante*, p. 38.— *Dyer* v. *Baumeister*, No. 2633.

Affirmed on authority of *The State* v. *Addington*, 12 Mo. App. 214. — *The State* v. *Schwartz*, No. 2558, and *The State* v. *Hake*, No. 2559.

(1.) In an action against the pledgee of goods illegally pledged by the owner's factor, and converted by the pledgee, the measure of damages is the fair value of the

Digitized by Google

goods, if sold by the factor in the usual way, less commissions, and whatever advances the factor has made on the goods. (2.) A finding by the court, without a jury, will not be reversed as against the evidence if it can be sustained on any theory of the law applicable to the facts. — *Alabama and Georgia Manufacturing Company*, App. v. *Third National Bank*, Resp. No. 2651. *Affirmed.* John D. Pope, for the appellant; Overall & Judson, for the respondent. Opinion by BAKEWELL, J.

(1.) A man imprisoned or a criminal offence will not be discharged under a writ of *habeas corpus* for a mere irregularlty in the commitment. (2.) A prisoner having been committed for trial on a charge of obtaining money by means of a bogus instrument of writing, the question as to which of two repugnant sections of the statute prevail does not arise in a *habeas corpus* proceeding. — *In re Bouquette.* No. 2760. *Prisoner remanded.* Opinion by LEWIS, P. J.

14 576 | 114m 640 | 14c 576 | 58 566 | 14c 576 | 142m 47

(1.) Judgment against an infant based upon the appearance of the infant by his guardian without previous service upon the infant is void under the present statute. (2.) The proper defence of a suit against an infant is a necessity for the cost of which the estate may be liable. (3.) A request for the defence of such a suit may be presumed from the necessities of the case, taken in connection with the exercise of discretion by the guardian *ad litem* in engaging for such defence the services of the law firm of which he is a member. — *Nagel*, Resp., v. *Schilling*, App. No. 2629. *Reversed.* M. W. Watson, for the appellant; H. I. D'Arcy, for the respondent. Opinion by LEWIS, P. J.

(1.) A bill to enforce specific performance of a contract to reconvey land when the rock upon it shall have been quarried to its full depth, is a proper proceeding. There is no

Digitized by Google

adequate remedy at law. (2.) An objection to a bill in equity that there is an adequate remedy at law, can not avail to reverse the decree, if made for the first time on appeal. (3.) An appellant will not be heard on appeal to say that the decree is more favorable to him than the facts of the case warrant. (4.) In equity proceedings an appellate court will examine and weigh the evidence. —*Heman*, Resp., v. *Skrainka*, App. No. 2692. *Affirmed.* R. E. Rombauer, for the appellant; W. B. Thompson, for the respondent. Opinion by THOMPSON, J.

A mechanic who, while erecting a building under a written contract, agrees orally with the owner to build and does build an additional room which is made a part of the original building, is entitled to a lien on the whole building for the work done under the oral agreement. — *Sontag*, Resp., v. *Doerge*, App. No. 2626. *Affirmed.* M. F. Taylor, for the appellant; Wm. F. Broadhead, for the respondent. Opinion by THOMPSON, J.

Material alterations in a contract will discharge the surety if made without his consent. — *Gugerty*, Resp., v. *Vieths*, App. No. 2691. *Reversed.* R. E. Rombauer, for the appellant; Valle Reyburn and G. D. Bantz, for the respondent. Opinion by THOMPSON, J.

(1.) Title to goods sold "on memorandum" that is "sale or return," passes to the vendee upon delivery subject to a defeasance by exercising the option to return the goods. (2.) Until the right to return has been exercised the goods are at the vendee's risk, and if they are destroyed in his possession he is liable for their agreed value. (3.) A sale of staple goods "on memorandum" for the "price prevailing in the market next January," is not void for uncertainty, if the price can be definitely fixed by testi-

Digitized by Google

mony.—*Ammidown*, App., v. *Powell*, Resp. No. 2442. *Reversed*. Krum & Krum, for the appellant; Lee & Chandler, for the respondent. Opinion by THOMPSON, J.

(1.) Taxing power is granted to the city of St. Louis by the constitution of 1875. (2.) The framers of the scheme and charter had power to confer jurisdiction in street opening proceedings upon the circuit court. (3.) The constitution of 1875 imposes no obligation that before the levy of the tax, a district shall be ascertained within which benefits for the street opening shall be assessed. (4.) Petitions for street opening proceedings need not set out the manner in which commissioners were qualified. (5.) Courts will take judicial notice of the statutory qualifications prescribed for street commissioners. (6.) The assessment of benefits in street opening proceedings is not a judgment which concludes the property-holder. (7.) The tax bills issued under a street opening proceeding is not *prima facie* evidence, as in other cases. (8.) A defendant in an action to collect the tax may make any defence which he could have made in the condemnation proceedings. (9.) It is immaterial that a property-holder who is properly summoned in an action to enforce the lien of such special tax had no notice of the original proceedings.—*City of St. Louis*, Resp., v. *Greely*, App. No. 2705. *Affirmed*. S. A. Holmes, for the appellant; L. Bell, for the respondent. Opinion by THOMPSON, J.

Questions as to whether a cause was properly referred or as to whether the referee erred in admitting testimony are matters of exception, and will not be reviewed on appeal in the absence of a motion for a new trial.—*Donahue*, Resp., v. *Maloney*, App. No. 2703. *Affirmed*.—T. J. Rowe, for the appellant; C. S. Hayden, for the respondent. Opinion by THOMPSON, J.

Digitized by Google

(1.) A statement which will apprise the defendant of the subject-matter of the suit and which will bar another action is sufficient in an action before a justice of the peace. (2.) A promise by a principal to repay to his broker money paid on reclamations, ordered paid by the principal, for defects in goods sold by the broker for his principal, is not within the statute of frauds. — *Dewey*, Resp. v. *Massingale*, App. No. 2695. *Affirmed.* Davenport & Napton, for the appellant; H. W. Bond, for the respondent. Opinion by BAKEWELL, J.

(1.) When there is evidence that the parties had, because of the necessities of the case, agreed that their contract should be executed on the basis of certain hearsay testimony, a finding of fact as to this will not be reviewed, on appeal, for the purpose of determining that the hearsay evidence was inadmissible. (2.) Objections to evidence not distinctly made at the time the evidence is offered is waived. (3.) An instruction excluding evidence may properly be refused if proper objections were not made when the evidence was offered, even though the evidence should have been excluded upon proper objection thereto. — *Ring*, Resp., v. *Canada Southern Line*, App. No. 2534. *Affirmed.* Joseph Dickson, for the appellant; Hayden & Glover, for the respondent. Opinion by THOMPSON, J. 14 579 Case 2 98 455

(1.) Contributory negligence of a child killed by a street railroad car will not prevent a recovery, if the driver of the car could, by the exercise of reasonable care, have seen the child and avoided injury. (2.) Contributory negligence being shown, and there being substantial evidence of want of care on the part of the driver, the case is properly submitted to the jury. (3.) Appellate courts will not interfere with the trial court's exercise of discretion in overruling a motion for a new trial, unless such discretion has been

Digitized by Google

manifestly abused.—*Pearson*, Resp., v. *Union Railway Company*, App. No. 2719. *Affirmed.* Brown & Young, for the appellant,; Martin & Fauntleroy and W. C. Marshall, for the respondent. Opinion by BAKEWELL, J.

14 580 46 469 (1.) In an action against a railroad for damages for the killing of stock on the road, it will be presumed, after verdict, in the absence of contrary evidence, that the defendant owned the road at the time of the accident. (2.) In such an action before a justice of the peace, a statement which substantially follows the statute is sufficient. (3.) There is no variance between an allegation that a calf was killed at a certain station, and proof that it was killed nine hundred feet distant from the station.—*Brown*, Resp., v. *Missouri Pacific Railway Company*, App. No. 2749. *Affirmed.* G. Pitman Smith, for the appellant; M. F. Taylor, for the respondent. Opinion by BAKEWELL. J.

"It requires evidence of the most convincing character to establish a resulting trust; and the oral evidence to establish a resulting trust in the face of an absolute deed should be so emphatic and unequivocal as to banish every reasonable doubt. Where the alleged *cestui que trust* and the trustees directly contradict each other on the witness stand as to all material matters in controversy, and there are no strong corroborating circumstances, the testimony of one other witness, who is hostile to defendant, ought not to be held sufficient to establish a resulting trust against the deed, where the whole matter depends upon conversations held about nine years before the trial, and the suit to establish the trust was not begun until more than seven years after the deed."—*Shaw*, Resp. v. *Shaw*, App. No. 2746. *Reversed.* T. F. McDearmon, for the appellant; H. C. Lackland and C. W. Wilson, for the respondent. Opinion by BAKEWELL, J.

Digitized by Google

(1.) The evidence being substantial and the instructions unexceptional, an appellate court will not reverse a conviction on the sole ground that it seems to be against the weight of the evidence. (2.) An application for a new trial on the ground of newly discovered evidence must show diligence.— *The State*, Resp., v. *Schmidt*, App. No. 2724. *Affirmed.* Foster & Claiborne, for the appellant; W. C. Jones, for the respondent. Opinion by LEWIS, P. J.

Parties will in no case be allowed to stipulate and submit the cause upon the record. Unless a statement and brief be filed by the appellant the appeal will be dismissed.— *The State*, Resp., v. *Burns*, App. No. 2725. *Appeal dismissed.* J. Furling, for the appellant; W. C. Jones, for the respondent. Opinion by LEWIS, P. J.

(1.) In a proceeding in equity to subject the property of a married woman to the payment of the contract price of work, the appellate court will review the evidence. (2.) In such an action a judgment for the plaintiff will be reversed on appeal, where the substantial weight of the evidence is against the finding. (3.) Where no place of delivery of an article purchased is named in the contract the place of the sale will be the place of the delivery. (4.) Under a contract to pay in instalments the last payment to be made on delivery at a certain place of the thing bought, there must be a delivery before the last payment can be recovered. (5.) The rule that one who sues upon a contract can not recover upon a *quantum meruit* does not apply where the defendant sets up the *quantum meruit* and prays judgment on that basis. (6.) In such a case the plaintiff should be allowed to elect whether he will abide by a judgment on the *quantum meruit*, or take back the property on the basis of a total failure to perform the contract. — *Lewis*, Plff. App., v. *Thomas*, Deft. App. No. 2666. Tatum, McCabe &

Digitized by Google

Jones, for the plaintiff; Crews & Flournoy, for the defendant. Opinion by LEWIS, P. J.

A husband and wife joined in a deed of trust conveying real estate of the wife to a trustee to secure a note of the husband. After the maturity of the note, in an action by the payee against the husband alone, to recover a balance alleged to be due upon the note after giving credit for the net proceeds of a foreclosure of the deed of trust, the defendant set up as a defence that, by an agreement between plaintiff and defendant, the property was bought in at the foreclosure sale by an agent of plaintiff, who was to hold the same until a day named, when the property should be sold to the highest bidder, and the net proceeds applied to satisfy defendant's note and the balance, if any, paid to plaintiff; that plaintiff on the day named withdrew the property from sale, and released a person who had bid in a part of the lots; that, if the sale had been carried out, the property would have brought enough to satisfy the note. Defendant prayed that the sale be declared void, and the title to the property revested in the grantors in the deed of trust. The court gave judgment for the note with leave to the defendant to redeem within sixty days, such redemption to be a satisfaction of the judgment on the note; held, that defendant can not complain of this decree; that, as the wife is not before the court, no decree can be made affecting her interests in the property: and that the facts set up are no bar to the plaintiff's right of action upon the note. — *O'Fallon*, Resp., v. *Clopton*, App. No. 2436. *Affirmed.* Bryan & Clopton, for the appellant; H. Hitchcock, for the respondent. Opinion by THOMPSON, J.

Where a married woman had, for a long time, done business on her own account and in her own name, and had lent money in her own name, to warrant an instruction on the

Digitized by Google

theory that the money thus lent belonged to her husband, there must be substantial proof to that effect. —*The State to use*, Resp., v. *Gregory*, App. No. 2714. *Reversed.* F. Gottschalk, for the appellant; C. F. Joy and Hugo Muench, for the respondent. Opinion by THOMPSON, J.

(1.) A refusal to grant a continuance in a criminal case is not ground for a reversal except where the trial court's discretion has been manifestly abused. (2.) That which occurred at the trial can be preserved for review on appeal by bill of exceptions only. (3.) The acceptance of a juror by a defendant in a criminal action is a waiver of objections on account of matters stated by the juror on his *voir dire* examination. (4.) Objections to statements made by counsel in argument to the jury will not avail when made for the first time in the appellate court. (5.) The mere fact that a juror was temporarily separated from his fellows during their deliberation is not ground for a new trial. (6.) In a trial for other than a capital offence the record need not recite that the officer who had charge of the jury was specially sworn. (7.) In the absence of a contrary statement it will be presumed that an officer, whose duty it was to be sworn, was sworn. (8.) The overruling of a motion to quash an indictment on the ground of a material change in the indictment will not be reviewed where there is nothing in the bill of exceptions to show in what respect the indictment was changed. (9.) A new trial will not be granted on the ground that the accused was a negro and the jurors were all white men. — *The State*, Resp., v. *Pollard*, App. No. 2685. *Affirmed.* J. Creech, for the appellant; J. Wells, for the respondent. Opinion by THOMPSON, J.

(1.) The return of a sheriff to a summons which shows a substantial compliance with legal requirement is sufficient. (2.) In construing such a return the construction most favorable to the officer's having performed his duty will be

Digitized by Google

given. (3.) A variance between the execution and the judgment which is not substantial will not render a sale under the execution void if the judgment can readily be identified from the execution. (4.) An action to collect back taxes is a suit *inter partes* and governed by the ordinary rules in such actions. (5.) The objection that a judgment is excessive can not be raised in a collateral proceeding. (6.) The power conferred upon the governor to purchase land for the state at tax sales must be exercised in the mode prescribed; but the sheriff's return, or deed, need not show how this power was exercised. (7.) A tender of the amount of the judgment and costs by the former owner is of no avail after a sale under a judgment for back taxes. (8.) Evidence that the husband resides on the property will support a judgment for possession against a husband and wife. — *Howard*, Resp., v. *Still*, App. No 2689. *Affirmed.* Donovan & Conroy, for the appellant; M. W. Huff, for the respondent. Opinion by THOMPSON, J.

Whether a retention of proofs of loss by an insurer for a length of time is a waiver of defects of proof is a question for the jury. — *Kramer*, Resp., v. *People's Insurance Company*, App. No. 2567. *Reversed.* E. H. Gary and C. M. Whitney, for the appellant; David Goldsmith, for the respondent. Opinion by THOMPSON, J.

(1.) In an action before a justice on a written instrument accompanied by a written statement of the cause of action, it is not error to permit the filing of a fuller statement on appeal to the circuit court. (2.) In an action on a written obligation, oral testimony that at the time of the execution of the writing it was orally agreed that the payment to be made should not be made until a time subsequent to the date mentioned in the writing, is inadmissible. (3.) Evidence of the loss of the original writing warrants the introduction in evidence of a copy. — *Conn*, Resp., v. *McCullough*,

Digitized by Google

App. No. 2733. *Affirmed.* Hirzel & O'Grady, for the appellant; C. E. Gibson, for the respondent. Opinion by BAKEWELL, J.

(1.) Larceny in a dwelling house is grand larceny irrespective of the value of the property stolen. (2.) A room in which a person sleeps and lives is a dwelling house within the meaning of the statute, though it is in a building other rooms in which are devoted to business purposes. (3.) Bad grammar does not vitiate an instruction if the meaning thereof is not obscured. (4.) An indictment for larceny in a dwelling house is not bad after verdict because of the addition of the words "room and building" after the words "dwelling house." — *The State*, Resp., v. *Smith, alias Shepard*, App. No. 2672. *Affirmed.* A. W. Alexander, for the appellant; W. C. Jones, for the respondent. Opinion by BAKEWELL, J.

(1.) One who permits another to act as his general agent and to represent himself as such, is estopped to deny the agency in an action by one who has dealt with such other as agent. (2.) Delivery to a shipper, or to one whose agency the shipper is estopped to deny, discharges the carrier from liability for a misdelivery. (3.) If a delivery is made according to the directions of the shipper's agent, it is immaterial that such directions were not in writing, or that the agent disobeyed the shipper's secret instructions. (4.) A claim against a carrier for a misdelivery is a cause of action on contract, and is assignable. — *Watson*, Resp., v. *Hoosac Tunnel Line Company*, App. No. 2597. *Reversed.* T. A. Thoroughman, for the appellant; M. W. Watson, for the respondent. Opinion by BAKEWELL, J.

(1.) A proceeding by a creditor of a corporation against a stockholder can be begun, under the statute, only by motion in the original action against the corporation. (2.) An original petition against a stockholder which alleges that

Digitized by Google

the plaintiff is a judgment creditor of an insolvent corporation, that execution against the corporation has been returned *nulla bona*, and that the defendant is the holder of unpaid stock in the corporation states no cause of action at common law. (3.) Where an answer is filed to such a petition, and a motion to strike out parts of the answer is filed, the court may treat the answer as a demurrer, and may strike out the petition. *Paxson*, App., v. *Talmage*, Resp. No. 2750. *Affirmed*. J. A. Harrison, for the appellant; T. J. Portis, for the respondent. Opinion by BAKEWELL, J.

(1.) In attachment direct proof of fraud is not necessary, but such evidence of fraudulent concealment or disposition of the defendant's property as will warrant an inference of fraud may be sufficient. (2.) A defendant who was in court and testified, can not object for the first time, on appeal, that the signature to his deposition introduced as an admission against interest was not proved. — *Chatham National Bank*, Resp., v. *Goldsoll*, App. No. 2141. *Affirmed*. Krum & Binswanger, for the appellant; Lee & Chandler, for the respondent. Opinion by BAKEWELL, J.

14 586 | 34 265 | 34 546 | 14 586 | 43 337

(1.) It is within the discretion of the trial court to allow the sheriff to amend his original return so as to make it show that the garnishee was summoned, where the garnishee has appeared and answered. (2.) The question as to a fraudulent transfer of assets may be tried in a garnishment proceeding on issues made up by the garnishee's reply to the plaintiff's denial of his answers to the interrogatories filed. (3). The plaintiff may acquire greater rights against a garnishee who is in possession of property of the defendant in execution under a fraudulent transfer than he had against the defendant himself. (4.) If a garnishee's answer would not criminate him or impeach title to land, he is not excused from answering merely because the answer shows that he

Digitized by Google

was a party to a fraudulent transfer of property. (5.) A garnishee who is a party to a fradulent transfer of property can not retain such property as against the vendor's execution creditor because the garnishee's notes for a part of the purchase money are in the hands of persons not before the court. — *St. Louis Brokerage Company*, Resp. v. *Cronin*, App. No. 2054. *Affirmed*. Donovan & Conroy, for the appellant. Fisher & Rowell, for the respondent. Opinion by BAKEWELL, J.

Mandamus will not be awarded to compel the sucessor of a judge whose term had expired to make a *nunc pro tunc* entry, where the minute entry had been cancelled by direction of the judge a few days after it was made, where the judge's recollection is that the order was not made, where the clerk testifies that his attention was distracted at the time the minute entry was made; although the relator's attorney testifies positively that he distinctly heard the court make the order in open court. — *State ex rel.* v. *Lubke*. No. 2699. Charles B. Stark and A. Moore Berry, for the relator; B. D. Lee, for the respondent. Opinion by BAKEWELL, J.

(1.) Under section 2123, of the Revised Statutes, damages are not restricted to pecuniary loss, and may be awarded to the parents for the death of a child without any evidence of the present or prospective value of such child's services. (2.) The owner of premises demised to a tenant for a term of years is not liable for a nuisance created and maintained by the tenant. (3.) In such a case, that the city is liable in an action for damages for the nuisance does not make the owner a necessary party defendant under the charter of the city of St. Louis. (4.) A finding by the jury as to defendants as to whom the action was dismissed at the close of the plaintiff's case, is unnecessary. (5.) A municipal corporation can not limit its liability by

Digitized by Google

the passage of an ordinance limiting a time during which it shall not be liable for damages occasioned by the falling of dangerous walls which it has allowed to remain standing. (6.) Where the tenant in possession owning certain improvements which were burned, sells the old iron in the ruins and the purchaser, under a license from the tenant, is in possession removing the old iron, which removal, with the purchaser's knowledge, still further weakens the walls, it is properly left to the jury to determine whether such purchaser used ordinary care and prudence in such removal, and the jury are properly told that if the fall of the wall was caused by the careless removal of the iron the purchaser is liable for the damage.—*Grogan*, Resp., v. *Broadway Foundry Company*, App. No. 2575. *Affirmed.* Taylor & Pollard, Madill & Ralston, and Leverett Bell, for the appellants; G. M. Stewart, for the respondent. Opinion by BAKEWELL, J.

(1.) It is error to instruct as to murder in the second degree where the homicide is committed under circumstances which exclude any hypothesis but that of murder in the first degree, but for the unsupported testimony of the defendant that he did not intend to kill. (*The State* v. *Weiners*, 66 Mo. 13.) (2.) When there is no evidence of any other crime than murder in the first degree except the testimony of the defendant which, if believed, makes out a case of justifiable homicide and the court correctly instructs as to murder in the first degree and as to justifiable homicide, and there is a conviction of murder in the first degree, the giving of an instruction as to murder in the second degree is harmless, and is not ground for a reversal. (3.) The presumption of an intent to kill arising from the deliberate use of a deadly weapon aimed at a vital part may be rebutted by the testimony of the accused that he did not intend to kill. (*The State* v. *Banks*, 73 Mo. 592.) (4.) The character of the accused for violence may be

Digitized by Google

inquired into where the homicide occurs under circumstances which render it doubtful whether the act was committed in self-defence under a well grounded apprehension of immediate danger, but his character generally may not be investigated. — *The State*, Resp., v. *Jones*, App. No. 2772. *Affirmed.* W. F. McEntire and S. S. Bass, for the appellant; C. O. Bishop, for the respondent. Opinion by BAKEWELL, J.

(1.) A railroad company is liable for double damages 14 589 36 154
for injuries to cattle entering upon the railway tracks by reason of a failure to erect fences between the railway tracks and a contiguous parallel public highway. (2.) Where the owner of stock, in violation of the law, tethers his stock on the public highway, such act bars a recovery against the railway for injuries to such stock, notwithstanding such failure to fence. — *Patton*, App. v. *West End Narrow Gauge Railway Company*, Resp. No. 2657. *Affirmed.* Geo. W. Royse and W. F. Broadhead, for the appellant; M. F. Taylor, for the respondent. Opinion by LEWIS, P. J.

A charter provision prohibited any change in the salary of a city officer during his term of office. The officer's term of office was four years "and until his successor shall be elected and qualified." The salary of the office was increased during the four-year term. *Held*, that the officer was entitled to the increased salary for a time during which he held over after the expiration of the four year term. — *The State ex rel.* v. *Smith*. No. 2783. Peremptory *mandamus* awarded. John D. Stephenson, for the relator; Leverett Bell, for the respondent. Opinion by BAKEWELL, J.

(1.) A master is bound to notify an inexperienced servant of the dangerous character of the work about which

Digitized by Google

he is employed. (2.) That a servant is seventeen years of age, and intelligent, and knows of the existence of a set screw in a revolving shaft is not conclusive of a knowledge of the danger of the work. (3.) The question whether under such circumstances the servant was taking a known risk in walking over the shaft is a question for the jury. (4.) The court of appeals will not review questions determined by the supreme court in the same case on a former appeal. — *Dowling*, Resp. v. *Allen*, App. No. 2721. *Affirmed.* Broadhead & Haeussler, and Alex. Martin, for the appellant; Fisher & Rowell, for the respondent. Opinion by BAKEWELL, J.

(1.) Proof of a gift by an aged person to the wife of her confidential agent and adviser must be clear and satisfactory. (2.) In the absence of documentary evidence or of the testimony of a disinterested witness, as to the gift, the person in possession must account for the property to the legal representatives of the deceased alleged donor. — *Priest*, App. v. *Way*, Resp. No. 2641. *Reversed.* E. T. Farish, for the appellant; John M. Glover, for the respondent. Opinion by THOMPSON, J.

Where it is clear that the striking of a clock and the ringing of a chime of bells from a church tower interferes with the physical comfort of ordinary persons living adjacent thereto, an injunction will lie to restrain the striking of the clock during the night and the ringing of the chimes except as a summons to religious worship. — *Leete*, Plff., v. *Pilgrim Congregational Society*, Deft., No. 2461. *Reversed.* E. T. Allen and Henry H. Dennison, for the plaintiff. Fisher & Rowell, and W. B. Homer, for the defendant. Opinion by THOMPSON, J.

An indictment charging that the accused obtained, by false pretences, from A, the property of B, is sufficient

Digitized by Google

without stating the nature of A's possession. — *The State*, Resp. v. *Williams*, App. No. 2781. *Affirmed.* W. Bush, for the appellant; J. R. Harris, for the respondent. Opinion by THOMPSON, J.

A bank which holds and owns a depositor's past due note, 146 501
the amount of which exceeds the amount on deposit, may 62 183
hold the deposit account against the note, and may refuse to pay checks drawn against the deposit. — *Ehlermann*, App., v. *St. Louis National Bank*, Resp. No. 2704. Broadhead & Haeussler, for the appellant; Henry Hitchcock, for the respondent. Opinion by THOMPSON, J.

(1.) An appellate court will not consider points not raised by the motion for a new trial. (2.) Instructions not warranted by the evidence are properly refused. — *Hildreth Printing Company*, Resp., v. *Stokes*, App. No. 2286. *Affirmed.* Brown & Hamm, for the appellant; W. C. Marshall, for the respondent. Opinion by THOMPSON, J.

Appellate courts will not weigh evidence in law cases.— *Traube*, Resp., v. *Chicago & Alton Railroad Company*, App. No. 2771. *Affirmed.* R. H. Kern, for the appellant; Broadhead & Haeussler, for the respondent. Opinion by THOMPSON, J.

(1.) In an action to remove a cloud upon the title to real estate the plaintiff must allege and prove possession. (2.) A court of equity may refuse to set aside an executed conveyance, though the facts might not warrant its enforcement. (3.) A court of equity may refuse to declare void an incumbrance, upon the ground that to do so would work an injustice. — *Charm Manufacturing Company*, App., v *Donovan*, Resp. No. 2748. *Affirmed.* Geo. M. Forster, for the appellant; F. J. Donovan, *pro se.* Opinion by THOMPSON, J.

Digitized by Google

Under the statute of 1853, the probate court could not order a sale of land for the maintenance of a minor, and a sale made under such an order did not pass the minor's interest in the land. — *Blackburn*, App., v. *Bolan*, Resp. No. 2784. *Affirmed.* C. Daudt, for the appellant; T. Bruere and F. W. Hinman, for the respondent. Opinion by THOMPSON, J.

(1.) An owner who reserves to himself no control over the execution of the work of erecting a building, but whose contract with the builder is such that if the work is carefully done in accordance with it no damage can ensue to adjoining property is not liable for damage resulting from the manner of doing the work. (2.) The verdict being for the right party, that the jury disregards improper instructions is not ground for a reversal on appeal. (3.) A verdict for nominal damages on one of two counts for the same cause of action may, in support of the judgment, be taken as a verdict for the defendant, where the substantial verdict is for the plaintiff on the other count. (4.) The unnecessary joinder of the trustee of a married woman with her in an action for injury to realty belonging to her at the date of the injury is not ground for a reversal of a judgment for the plaintiff on appeal. — *Nelson*, Resp., v. *Connecticut Mutual Life Insurance Company*, App. No. 2734. *Affirmed* Dyer, Lee & Ellis, for the appellant; Broadhead & Haeussler, for the respondent. Opinion by BAKEWELL, J.

14 592
Case 3
90 316

(1.) The failure of a servant to use proper appliances provided for the prevention of injury in the use of machinery, in consequence of which failure he is injured, is such contributory negligence as will prevent a recovery. (2.) A master is not bound to explain to his servant, who is a man of ordinary intelligence, apparent dangers in the use of machinery. — *Wolter*, App., v, *Harrison Wire Com-*

Digitized by Google

pany, Resp. No. 2768. Finkelnburg & Rassieur, for the appellant; E. T. Allen, for the respondent. Opinion by BAKEWELL, J.

(1.) One who has become owner since a mechanic's lien attached is not a necessary party to a suit to enforce the lien. (2.) Notice of an intention to file a mechanic's lien is properly given to the person who was owner when the work was begun, though the title has since passed to another. — *Koenig*, Resp., v. *Boehme*, App. No. 2802. 14 593 Case 2 100 293 *Affirmed*. Jamison, Collins & Jamison, and C. M. Napton, for the appellant; Gottschalk & Bantz, for the respondent. Opinion by BAKEWELL, J.

A justice's docket entry, "Plaintiff produced a copy of the contract in evidence, to which defendant objected, because the original should be produced; plaintiff neglected to have taken the legal steps to have said original contract produced in court, whereupon it is adjudged by the justice that the case be dismissed at plaintiff's cost," is a final judgment of non-suit, from which an appeal lies. — *Bryce*, Resp., v. *Foy*, App. No. 2816. *Affirmed*. E. C. Slevin, for the appellant; Isaac T. Wise, for the respondent. Opinion by THOMPSON, J.

In a suit on a contract, the defendant can not, on appeal from a justice, give evidence of a breach of another contract which was not pleaded before the justice. — *Kinealy*, Resp., v. *Parke*, App. No. 2814. *Affirmed*. L. Wilcox, for the appellant; Turner & Morris, for the respondent. Opinion by THOMPSON, J.

That the court admits evidence tending to show payment when the plea of payment is not averred with technical accuracy, is not ground for a reversal of the judgment, in the absence of any question of surprise. — *Parks*, App., v.

Digitized by Google

Richardson, Resp. No. 2764. *Affirmed*. T. H. Culver and J. K. Hansbrough, for the appellant; Phillips & Stewart, for the respondent. Opinion by THOMPSON, J.

The recording of a chattel mortgage imparts notice to the mortgageor's subsequent creditors. — *Long*, App., v. *Uhlich*, Resp. No. 2800. *Reversed*. M. N. Sale, for the appellant; Fritchey & Alexander, for the respondent. Opinion by THOMPSON, J.

A conveyance made for the purpose of preventing a judgment creditor of the grantor from approaching the grantor's interest in the land, conveys no title to one who shared in the grantor's fraudulent purpose. — *Earl*, Resp., v. *Hart*, App. No. 2411. *Reversed*. C. L. Moss, for the appellant; G. M. Stewart and Paul Bakewell, for the respondent. Opinion by LEWIS, P. J.

(1.) That which is omitted in one instruction may be supplied by another, and if the whole are consistent and correct it is sufficient. (2.) The question being as to the violence of a storm at St. Louis it is not error to exclude a report of the signal bureau as to its violence at other points. (3.) A cause will not be reversed because the jury have found a fact contrary to the uncontradicted testimony of several witnesses. (4.) Proof that a wall fell by reason of an unusual storm is not necessarily fatal to a recovery for an injury occasioned by the fall, where there is evidence tending to show that the wall was too weak to withstand an ordinary storm. — *Roos*, Resp., v. *Clark*, App. No. 2803. *Affirmed*. H. T. Kent and James A. Seddon, for the appellant; Smith & Harrison and George J. Davis, for the respondent. Opinion by BAKEWELL, J.

(1.) One who sells goods on the credit of one who represents himself as a member of a corporation which does not

Digitized by Google

in fact exist, is not estopped in a suit against such person for the purchase price to set up the facts. (2.) That the creditor had brought suit against the supposed corporation which he abandoned on learning the facts, does not estop him to deny the incorporation. (3.) Appellate courts do not take judicial notice of the statutes of other states. (4.) There is no presumption that the statute law of a sister state is that of the *forum*. (5.) The presumption is in favor of the action of the trial court in refusing to admit a certificate of foreign incorporation when the record does not show what was the corporation law of the foreign jurisdiction. A compliance with the statute which provides that upon the recording of a copy of the articles of association the corporation shall be deemed fully organized, and may proceed to business, is an essential prerequisite to such a corporate existence as will absolve the individual members from liability as copartners. — *Rohan Bros. Boiler Manufacturing Company*, Resp., v. *Richmond*, App. No. 2801. *Affirmed.* S. B. Gordon, for the appellant; Smith & Harrison, for the respondent. Opinion by BAKEWELL, J.

(1.) An annual settlement of a guardian of a lunatic may be reviewed in an action on the guardian's bond brought before final settlement. (2.) A guardian who refuses to give his successor a schedule or to turn over the property is guilty of a conversion. (3.) There being no evidence that the guardian of a lunatic had attempted to collect the choses in action, and no evidence of their value, the referee in an action on the guardian's bond correctly presumes they are worth their face value and interest. (4.) A guardian of a lunatic has no power to engage in business for his ward and is properly refused commissions for money disbursed by him in such business. — *The State ex rel.*, Resp., v. *Jones*, App. No. 2755. *Affirmed.* A. R. Taylor and S. Simmons, for the appellant; G. A. Castleman and J. A. Harrison, for the respondent. Opinion by THOMPSON, J.

Digitized by Google

(1.) A former partner is, after dissolution of the copartnership, competent to prove the existence of the copartnership. (2.) A motion for a new trial on the ground of newly discovered evidence is properly overruled unless accompanied by an affidavit showing diligence. — *Williamson-Stewart Paper Company*, Resp., v. *Hilder*, App. No. 2815. *Affirmed.* C. M. Napton, for the appellant; A. Moore Berry and Charles B. Stark, for the respondent. Opinion by BAKEWELL, J.

(1.) An instruction which assumes as proved a controverted material fact is properly refused. (2.) The judgment in a civil action will not be reversed because the instructions were not explicit, if those given were correct and no legal instruction was refused. (3.) The trial court was not bound to give instructions of its own motion — it is the duty of counsel to ask for such instructions as his cause demands. — *Cahill*, Resp., v. *Liggett & Meyers Tobacco Company*, App. No. 2809. *Affirmed.* Smith & Harrison, for the appellant; Brown & Young, for the respondent. Opinion by BAKEWELL, J.

(1.) The taking of an appeal from a justice's judgment is a waiver of irregularities in the service of summons or proceedings at the trial before the justice. (2.) That a cause which was pending at the death of a justice was not called before his successor on the day to which it was continued is not ground for dismissal on appeal, where the parties appeared at the trial. (3.) That one called as a witness for the plaintiff is attorney for the defendant in another matter does not disqualify him as a witness. — *Martin*, Resp., v. *Prietto*, App. No. 2827. *Affirmed.* L. J. Smith, for the appellant; Eber Peacock, for the respondent. Opinion by BAKEWELL, J.

(1.) Presumptions are not indulged in favor of a pleading. (2.) A statute which grants extraordinary exemptions

Digitized by Google

from taxation will be strictly construed. (3.) An exemption from taxation of property purchased for the purpose of erecting a hall is not an exemption from taxation of property with a hall already erected. (3.) In the absence of allegation or proof it will not be assumed that a Masonic institution is a charity.— *The State ex rel.*, Resp., v. *Central St. Louis Masonic Hall Association*, App. No. 2610. *Affirmed.* W. E. Pattison and Leo Rassieur, for the appellant; M. B. Jonas, for the respondent. Opinion by LEWIS, P. J.

(1.) Appellate courts will not review matters of exception not called to the trial court's attention by motion for a new trial. (2.) Section 2508, of the Revised Statutes, as 14 597
to the duty of vendors, has no application to unconditional 52 429
sales of chattels. (3.) A married woman may, under the statute (Rev. Stats., sect. 3296), create a trust in respect of her separate property without her husband's co-operation. (4.) Indulgence as to time, given by a chattel mortgageor, is not a waiver of the security.—*Daily*, App., v. *Singer Manufacturing Company*, Resp. No. 2808. *Affirmed.* Robert W. Goode, for the appellant; Taylor & Pollard, for the respondent. Opinion by THOMPSON, J.

(1.) Equity will not compel the foreclosure of a mortgage where the conditions precedent to a foreclosure have not been complied with. (2.) A bank failed and issued to its creditors certificates of indebtedness, secured by the mortgage of a third person which provided that before a foreclosure all the collectible assets of the bank must have been collected and applied. There was an uncollected balance which, together with the mortgaged property upon which taxes were accumulating, was insufficient to pay the outstanding certificates of indebtedness. The holder of one of these certificates obtained judgment thereon and brought his bill in equity, reciting the foregoing facts, to foreclose

Digitized by Google

the mortgage. *Held*, that the bill contained no equity. — *Reilly*, App., v. *Butchers and Drovers' Bank*, Resp. No. 2580. *Affirmed.* James O. Broadhead and I. H. Lionberger, for the appellant; George A. Madill and Henry Hitchcock, for the respondent. Opinion by THOMPSON, J.

(1.) Proof that the damage occurred three years prior to the time alleged in the petition does not constitute a variance. (2.) Objections to the form of a question in a deposition will not be considered where the objector was present and cross-examined the witness at the taking of the deposition and made no objection then. (3.) The admission of incompetent testimony which it does not appear could have prejudiced the appellant is not ground for a reversal of the judgment on appeal. — *Lesinsky*, Resp., v. *Great Western Dispatch*, App. No. 2834. *Affirmed.* Pattison & Crane, for the appellant; A. Arnstein and W. C. Marshall, for the respondent. Opinion by BAKEWELL, J.

It requires evidence to overcome an account stated, and where the balance has been paid it requires stronger evidence to overcome the settlement than where the balance is simply agreed upon. — *Nolte*, App., v. *Leary*, Resp. No. 2860. *Affirmed.* Louis Gottschalk, for the appellant; A. R. Taylor, for the respondent. Opinion by BAKEWELL, J.

Ten per cent damages will be awarded, when asked on affirming a judgment, the appeal from which is wholly without merit. — *Covey*, Resp., v. *Yarnall*, App. No. 2822. *Affirmed.* J. F. Conroy, for the appellant; Louis A. Steber, for the respondent. Opinion by BAKEWELL, J.

(1.) Slight contributory negligence on the part of the plaintiff will not necessarily bar a recovery. (2.) In an action for damages for a personal injury, it is not error to refuse to take the case from the jury, though there is sub-

Digitized by Google

stantial evidence of contributory negligence, if, from the evidence there is not a necessary inference that the injury was caused by the plaintiff's negligence. (2.) The defendant left unfastened upon an inclined track twelve feet upon the ground, a heavy wheel, a portion of the track a few feet below the wheel having been removed so that if the wheel be set in motion it must roll through the gap; the wheel being situated above a portion of the defendant's premises where its employes congregated just before going to work. The plaintiff who had no notice of the physical facts, was seated, waiting to go to work, beneath this wheel, when another person, in sweeping, set the wheel in motion which in its fall crushed the plaintiff's leg. *Held*, that these facts were sufficient to support a verdict for the plaintiff. — *Peters*, Resp., v. *Harrison Wire Company*, App. No. 2825. *Affirmed*. E. T. Allen, for the appellant; Taylor & Pollard, for the respondent. Opinion by BAKEWELL, J.

An attorney's fee can not be taxed as costs in a partition 14b 599 144m 252
proceeding unless a contract between the attorney and the party to the suit be shown, but such contract need not be in writing. — *Frank*, Resp., v. *Crawford*, App. No. 2687. *Affirmed*. R. H. Kern, for the appellant; Eber Peacock, for the respondent. Opinion by LEWIS, P. J.

(1.) Property exempt from execution, to the head of a 14 599 35 156
family, under the statute, can not be reached by a creditor's bill. (2.) An answer alleging that "the entire property of the defendant consists of household effects not exceeding in value one hundred dollars exclusive of said patent right which is yet in an incomplete and unsatisfactory state of experimentation, and not worth in actual value one hundred dollars," sets up a good defence to a creditor's bill to reach the patent right. — *Ryan*, App., *v*. *Lee*, Resp. No. 2682. *Affirmed*. Paul Bakewell, for the appellant; Broadhead & Haeussler, for the respondent. Opinion by LEWIS, P. J.

Digitized by Google

(1.) Where the account sued on, and the counter-claim, contains respectively twenty-seven and fifteen items, the court may, of its own motion, refer the cause. (2.) That on the hearing before the referee the number of items are greatly reduced by the concession of the parties, is immaterial as affecting the order of reference. (3.) Except when limited in time by the order of reference, a referee is not bound to report to the next term of court. (4.) The court may at any time extend the time within which a referee must file his report. (5.) The finding of a referee is like the special verdict of a jury, and will not be reviewed where the evidence is not preserved by a bill of exceptions.—*Francisco*, Resp., v. *Rowland*, App. No. 2877. *Affirmed.* Broadhead & Haeussler for the appellant; L. J. Smith, for the respondent. Opinion by THOMPSON, J.

(1.) Under the charter of 1870, the city of St. Louis is liable for damages sustained by property holders by reason of the change of grade of a street so as to divest the current of travel, though the change does not extend to the whole road-bed. (2.) Under the charter and the ordinances of 1871, the city is liable to the owners of abutting real estate upon which permanent improvements have been made, for damages occasioned by a change of grade. (3.) In an action for damages for injury to property caused by a change of grade of a street it is immaterial that the change was necessary to carry on the traffic of the street.—*Mitchell*, Resp., v. *City of St. Louis*, App. No. 2790. *Affirmed.* Leverett Bell, for the appellant; E. T. Farish, for the for the respondent. Opinion by THOMPSON, J.

A compromise of a doubtful right is a good consideration for a promise, and the statement of an account between the parties after mutual compromise constitutes an estoppel *in pais.*—*Hewitt*, App., v. *Spannagel*, Resp. No. 2839. *Affirmed.* Roeder & Ritchie, for the appellant; Collier & Muench, for the respondent. Opinion by THOMPSON, J.

Digitized by Google

Words in a petition filed in a civil action charging that the defendant in the action is insolvent, are privileged, and can not be made the subject of an action for libel or for malicious prosecution.—*Rubelman*, App., v. *Luehman*, Resp. No. 2881. *Affirmed.* E. J. White and H. W. Bond, for the appellant; Robert Crawford, for the respondent. Opinion by THOMPSON, J.

(1.) An ordinance which provides that police justices shall forthwith issue execution for fines imposed, does not deprive the justices of their discretionary power to grant reprieves. (2.) A failure to issue an execution for a fine is an irregularity which in nowise affects the judgment. (3.) Pardons being in derogation of law, to be valid and of effect, must accurately describe the offence intended to be forgiven. (4.) A writing by the mayor licensing the person named to remain in town so long as he shall behave himself well, is neither a pardon nor a remission of a fine to which the writing in no way refers.—*Ex parte Higgins.* No. 2927. *Prisoner remanded.* Robert W. Goode, for the petitioner. Opinion by BAKEWELL, J.

Digitized by Google

INDEX.

ABANDONMENT. See Husband and Wife, 6.

ACCOUNT STATED.

It requires evidence to overcome an account stated, and where the balance has been paid it requires stronger evidence to overcome the settlement than where the balance is simply agreed upon. *Nolte* v. *Leary*, 598.

ACTIONS. See Bar to Actions; Costs, 1; Damages, 8; Equity, 6; Husband and Wife, 3; Mortgages, 8; Quantum Meruit; Stockholders, 12; Title, 1.

ADMINISTRATION. See Executors; Guardians, 2; Judgments, 5; Stockholders, 15.

Sales — Minors. — Under the statute of 1853, the probate court could not order a sale of land for the maintenance of a minor, and a sale made under such an order would not pass the minor's interest in the land. *Blackburn* v. *Bolan*, 592.

ADVERTISEMENTS. See Notice, 1.

AGENCY. See Attorneys, 1, 2; Bills, 2; Common Carriers, 8, 10, 11; Evidence, 7, 8; Factors; Notice, 3, 4; Principal and Agent.

1. Evidence. — In the absence of evidence of express appointment, of ratification, or of an estoppel, there is no sufficient evidence of agency. *Alexander* v. *Rollins*, 109.

2. Waiver. — A railroad passenger conductor is not a general agent of the road authorized to waive the terms of a written contract of carriage. *Id.*

3. Corporations — Notice. — Knowledge possessed by the secretary of a corporation touching his business and coming within the scope of his duties, as such secretary, is the corporation's knowledge. *Carroll* v. *People's Railway Company*, 490.

4. ——That such secretary, for his private gain, and without collusion with, or the knowledge of, the person dealing with him, fails to impart his knowledge to the corporation, is immaterial in an action against the corporation. *Id.*

5. ——A car conductor who, in leaving a part of his wages with the secretary of a corporation as a deposit, believes that he is depositing

Digitized by Google

AGENCY — Continued.

the same with the corporation, being partly induced to this belief by the action of the secretary in making a memorandum of the deposit in writing, at the time, on the books of the corporation, and by other circumstances, may recover from the corporation the money so deposited. *Id.*

6. ESTOPPEL. — The conductor's receipt on the books of the company for the full amount of his wages for each month will not estop him from recovering of the corporation the money so deposited with it. *Id.*

7. CONTRACTS. — An agent who disobeys the instruction of his principal may nevertheless bind his principal by his contracts made within the scope of his authority. *Crews* v. *Garneau*, 505.

8. NOTICE. — Notice by the principal to the other party to an executory contract that the agent had, in making the contract, disobeyed instructions, will not relieve the principal from obligations which have become fixed under the contract. *Id.*

9. ESTOPPEL. — One who permits another to act as his general agent and to represent himself as such, is estopped to deny the agency in an action by one who has dealt with such other as agent. *Watson* v. *Hoosac Tunnel Line Company*, 585.

AMENDMENTS. See BILLS OF EXCEPTIONS, 1; PRACTICE, TRIAL COURTS, 20.

1. PRACTICE — PLEADINGS — LIENS. — In actions on mechanic's liens, the power of amendment of pleadings will be liberally exercised to save a limitation. *Hannon* v. *Logan*, 38.

2. PRACTICE — PLEADINGS. — A proposed amendment of a petition to conform to the proofs is properly refused when offered after the dissolution of an injunction. *Cabanné* v. *Spaulding*, 312.

3. JUSTICES — APPEALS. — In an action before a justice on a written instrument accompanied by a written statement of the cause of action, it is not error to permit the filing of a fuller statement on appeal to the circuit court. *Conn* v. *McCullough*, 584.

APPEALS. See JUDGMENTS, 9; PRACTICE, TRIAL COURTS, 9.

1. JUDGMENT LIEN — SUPERSEDEAS. — The taking of an appeal which operates as a *supersedeas* does not extend the lien of the judgment beyond the statutory period of three years. *Christy* v. *Flanagan*, 258.

2. JUDGMENT FOR COSTS. — Any party to partition proceedings who is liable for the costs may appeal from an order directing separate executions for the costs against each defendant. *Zelle* v. *Bobb*, 267.

3. JUSTICES — WAIVER. — The taking of an appeal from a justice's judgment is a waiver of irregularities in the service of summons or proceedings at the trial before the justice. *Martin* v. *Prietto*, 596.

Digitized by Google

APPEALS — Continued.

4. DAMAGES. — Ten per cent damages will be awarded, when asked, on affirming a judgment the appeal from which is wholly without merit. *Covey* v. *Yarnall*, 598.

ASSAULT. See CRIMINAL LAW, 1.

ASSIGNMENTS.

CORPORATIONS. — The corporation's right of action against a subscriber to shares of its stock passes to its assignee under a general assignment. *Haskell* v. *Sells*, 91.

ATTACHMENTS. See COUNTER-CLAIMS, 1.

1. COUNTER-CLAIM. — A defendant in attachment can make no claim against the plaintiff for use of property while in custody of the officer under the writ of attachment. *Meincke* v. *Bracksieck*, 315.

2. JUDGMENT — EXECUTION. — In giving judgment for the plaintiff in such a case an order for a special execution against the attached property is proper, without making a specific order for each article. *Id.*

3. FRAUD — PRACTICE. — In attachment, direct proof of fraud is not necessary, but such evidence of fraudulent concealment or disposition of the defendant's property as will warrant an inference of fraud may be sufficient. *Chatham National Bank* v. *Goldsoll*, 586.

ATTORNEY AND CLIENT. See NEW TRIAL, 2; PARTITION, 1, 3; WITNESSES.

1. AGENCY — IMPLIED POWERS OF ATTORNEYS. — An attorney may by virtue of his implied powers, bind his client by a contract for the printing of briefs for use in an appellate court. *Williamson-Stewart Paper Company* v. *Bosbyshell*, 534.

2. —— An attorney may make his clients jointly liable for the printing of briefs when the expense to each client is not thereby increased. *Id.*

3. PRACTICE — EVIDENCE. — The printer need not show, in an action on such a contract, that the number of briefs printed was no greater than the number required to be filed in the cause. *Id.*

4. PRESUMPTIONS. — In such a case the courts will not presume that the cost of printing ten copies of a brief is greater than the cost of four copies. *Id.*

BACK TAXES. See EJECTMENT, 2; EQUITY, 5, 6; JUDGMENTS, 2.

1. ACTIONS. — A proceeding for the collection of back taxes is not a proceeding *in rem*. *Gitchell* v. *Messmer*, 83.

2. PARTIES. — The owner's interest in real estate assessed for taxation is not affected by a judgment in a proceeding to collect back taxes, to which proceeding such owner was not a party. *Id.*

Digitized by Google

BAILMENTS. See BILLS, 7; NEGLIGENCE, 18.

1. DEPOSIT OF PROPERTY FOR ILLEGAL PURPOSES. — The illegality of raffling does not relieve the depositary of property taken for the purpose of raffling it, from obligation to care for the same. *Woolf Bernero*, 518.

2. —— The depositary of property left with him to raffle is liable to the owner for the value thereof when it is lost by his gross carelessness. *Id.*

8. —— PRACTICE. — That the property was left to be raffled, is no part of the cause of action against the depositary for its loss, and it is immaterial that the owner's illegal object in leaving the property, incidentally appears at the trial. *Id.*

BANKS AND BANKING.

CHECKS — DEPOSITS. — A bank which holds and owns a depositor's past due note, the amount of which exceeds the amount on deposit, may hold the deposit account against the note, and may refuse to pay checks drawn against the deposit. *Ehlermann* v. *St. Louis National Bank*, 591.

BAR TO ACTIONS. See DAMAGES, 6; MASTER AND SERVANT, 2; RES-ADJUDICATA; TAXES, 2.

1. SPLITTING DEMANDS. — A recovery by the assignee of a part of a demand is not a bar to a recovery by the original creditor for the balance. *Fourth National Bank* v. *Noonan*, 243.

2. FORECLOSURE SALES. — Case adjudged. *O'Fallon* v. *Clopton*, 582.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS.

1. BILLS OF EXCHANGE — SIGHT DRAFTS — PRESENTATION — EVIDENCE. — Evidence of a custom among merchants to deposit in bank drafts which they have undertaken to collect for foreign customers, is inadmissible to excuse a failure to duly present a draft for payment. *Dyas* v. *Hanson*, 368.

2. —— AGENCY. — One to whom a draft is given for collection and who deposits it in bank for collection is responsible for the diligence of the bank in presenting the same for payment. *Id.*

8. —— A sight draft received for collection against a drawee who resides in the same city must be presented before the close of the succeeding day. *Id.*

4. —— A draft payable at sight must be presented for payment within a reasonable time. *Id.*

6. —— PRACTICE. — The question as to what is a reasonable time is one for the court after the facts are determined. *Id.*

6. —— It is error to submit the question of reasonable time to the jury, but it is not ground for a reversal, if the finding of the jury is correct. *Id.*

Digitized by Google

BILLS AND NOTES — Continued.

7. —— BAILMENTS. — A merchant who, in the usual course of business with a customer, accepts, for collection, mercantile paper from the customer according to an established usage between the two, is not a gratuitous bailee. *Id.*

8. —— ACCOMMODATION ACCEPTOR — PRESENTATION. — An accommodation acceptor of a draft is bound to pay the draft, though it is not presented for payment until long after its maturity and after the drawer has become insolvent. *Beveridge* v. *Richmond*, 405.

BILLS OF EXCEPTIONS. See CERTIORARI; PRACTICE, 5, 6.

1. AMENDMENTS — PRACTICE. — The original bill of exceptions can not be amended in the appellate court. *Holt* v. *Simmons*, 450.

2. —— Orders of continuances of a motion for a new trial can be made a part of the record only by bill of exceptions. *Id.*

3. PRACTICE. — That which occurred at the trial can be preserved for review on appeal by bill of exceptions only. *The State* v. *Pollard*, 583.

BONDED GOODS. See COMMON CARRIERS, 5.

CERTIORARI. See POLICE, 5; PRACTICE, 4.

AMENDMENTS — BILLS OF EXCEPTIONS. — An application for *certiorari* to amend the record, which does not show that the omitted matter is a part of the record proper, or is called for in the bill of exceptions, will be denied. *Holt* v. *Simmons*, 450.

CHANGE OF VENUE. See CRIMINAL LAW, 2; JUSTICES, 2.

CHATTELS. See MORTGAGES, 2.

CLERKS. See JUDGMENTS, 4; MANDAMUS.

COMMON CARRIERS.

1. RAILROADS — CONTRACT WITH PASSENGER. — The terms of a "round trip" ticket which provides that it must be stamped and the passenger's signature witnessed for identification by the connecting carrier before the passenger begins the return trip, are valid and binding. *Cloud* v. *St. Louis, Iron Mountain & Southern Railway Company*, 136.

2. —— DAMAGES. — The purchaser of such a ticket who has failed to comply with its terms can not, in the absence of evidence of a waiver or of want of opportunity to know its contents when he purchased it, have an action against the railroad because he was ejected from the car of a connecting road for failure to pay his fare. *Id.*

3. —— AGENCY — WAIVER. — The contract having been made by the agent of a line of connecting roads, the waiver of its terms by one of the roads will not bind the others. *Id.*

COMMON CARRIERS — Continued.

4. CONTRACTS OF CARRIAGE — FORWARDER. — A common carrier to whom is tendered goods as a common carrier, can not, without the shipper's knowledge and consent, receive them as a mere forwarder. *Mellier* v. *St. Louis & New Orleans Transportation Company*, 281.

5. BONDED GOODS. — A common carrier of bonded goods who receives goods in bond, for carriage, the bill of lading of which recites that they are to be transported in bond, is liable for a loss arising from a shipment of the goods on an unbonded vessel. *Id.*

6. DAMAGES. — A railroad company which, with knowledge of its contents, takes upon a freight car, as passenger's baggage, a sample trunk containing valuable merchandise, is liable for its loss while in transit. *Rider* v. *Wabash, St. Louis & Pacific Railway Company*, 529.

7. —— The company is not liable as a carrier if the passenger, finding that his trunk is too large to be put in the caboose, on his own account and responsibility and not as a delivery to a common carrier, places it in a box car, the company having no knowledge as to the character of its contents. *Id.*

8. —— EVIDENCE. — Testimony that the trunk was of a size and shape recognized by railroad men as a sample trunk is not conclusive of the company's knowledge that it was not a baggage trunk. *Id.*

9. ASSIGNMENTS — ACTIONS. — A claim against a carrier for a misdelivery is a cause of action on contract, and is assignable. *Watson* v. *Hoosac Tunnel Line Company*, 585.

10. AGENCY — MISDELIVERY. — Delivery to a shipper, or to one whose agency the shipper is estopped to deny, discharges the carrier from liability for a misdelivery. *Id.*

11. —— If a delivery is made according to the directions of the shipper's agent, it is immaterial that such directions were not in writing or that the agent disobeyed the shipper's secret instructions. *Id.*

CONSTABLES. See HUSBAND AND WIFE, 5.

CONSTITUTIONAL LAW. See MUNICIPAL CORPORATIONS, 1, 3, 4; STREETS, 2, 3; TAXES, 1, 3.

1. EQUALITY OF THE LAWS. — Section 19, of the Revised Statutes, page 1514, does not deny to citizens charged with crime in the city of St. Louis the equal protection of the laws. *The State* v. *Hayes*, 173.

2. ORDINANCES — RAILROADS. — A municipal regulation requiring street railroads to make quarterly reports of the number of passengers carried is not void as being unreasonable or in restraint of trade, and does not violate article V. of the amendments to the constitution of the United States. *City of St. Louis* v. *St. Louis Railway Company*, 221

Digitized by Google

CONSTRUCTION OF STATUTES. See STATUTES.

CONTINUANCES. See PRACTICE, TRIAL COURTS, 13.

CONTRACTS. See AGENCY, 7, 8; COMMON CARRIERS, 1, 4, 5; EQUITY, 1, 2, 10; EVIDENCE, 2; INSURANCE, 1, 2; MASTER AND SERVANT, 2; QUANTUM MERUIT, 1, 2; SALES, 4; STATUTE OF FRAUDS, 1.

1. PUBLIC POLICY. — A contract to employ counsel to appear before a committee of the municipal assembly to advocate a measure in which the person employing counsel has an interest is not necessarily void as against public policy. *Strathmann* v. *Gorla*. 1.

2. CORPORATIONS. — A contract between two corporations is not void merely because the directors are the same in both. *Alexander* v. *Williams*, 13.

3. PARTNERSHIP — EVIDENCE — PRACTICE. — In an action on a contract by which the defendant agreed to pay the plaintiff one-half of his interest in the net profits realized by the firm of which he was a member, on a certain contract, the plaintiff need not allege or prove a settlement between the defendant and his copartner; it is sufficient to show the net profits on the transaction and the defendant's interest therein. *Reilly* v. *Reilly*, 62.

4. PUBLIC POLICY. — A contract whereby a person binds himself to refrain from competing for public work is void as against public policy. *Engelmann* v. *Skrainka*, 488.

5. BREACH OF — DAMAGES. — In an action for a breach of a contract to erect a furnace "in a good and workmanlike manner, and to guarantee the said furnace to work satisfactorily in melting iron," the court properly rejects evidence that the furnace did not work to the plaintiff's satisfaction. *Pope Iron and Metal Company* v. *Best*, 502.

6. EVIDENCE. — Evidence of the cost of testing the furnace after its completion was properly refused, inasmuch as the cost of making the test was not to be paid for by the defendant. *Id.*

7. EXECUTORY. — He who enters into an executory contract and pays earnest money and then refuses to fulfil the contract, can not recover back the earnest money paid. *Crews* v. *Garneau*, 505.

8. MISTAKE — REFORMATION OF. — A writing, a mistake in the drafting of which makes it express an undertaking other than that agreed upon, may, on proper application, be reformed so as to express the true agreement. *Smith* v. *St. Louis Beef Canning Company*, 522.

9. CONTRACTS. — Are, under the statute, joint and several. *Williamson-Stewart Paper Company* v. *Bosbyshell*, 534.

10. SURETY. — Material alterations of a contract will discharge a surety. *Gugerty* v. *Viefhs*, 577.

11. SALE AND DELIVERY. — Under a contract to pay in instalments the

Digitized by Google

CONTRACTS — Continued.
last payment to be made on delivery, at a certain place, of the thing bought, there must be a delivery before the last payment can be recovered. *Lewis* v. *Thomas*, 581.

CON ERSION. See GUARDIANS, 3.

PLEDGES — FACTOR — DAMAGES. — In an action against the pledgee of goods illegally pledged by the owner's factor, and converted by the pledgee, the measure of damages is the fair value of the goods, if sold by the factor in the usual way, less commissions and whatever advances the factor has made on the goods. *Alabama and Georgia Manufacturing Company* v. *Third National Bank*, 576.

CONVEYANCES. See EJECTMENT, 3, 4.

CORPORATIONS. See AGENCY, 3; ASSIGNMENTS; CONTRACTS, 2; ESTOPPEL, 1; INSURANCE, 1, 2; NEGOTIABLE INSTRUMENTS, 1, 2; STOCKHOLDERS; VARIANCE, 1, 2.

1. STATUTES. — A business corporation organized in September, 1879, could not be incorporated under article VIII. of the revision of 1879, which did not go into effect until November following. *Haskell* v. *Sells*, 91.

2. SUBSCRIPTION. — An agreement to take shares in a corporation to be formed, enures to the benefit of the corporation when organized in pursuance of the subscription. *Id.*

3. —— The shares of stock being for $100 each, a subscription of $1,000 is not void for uncertainty. *Id.*

4. —— CONTEMPORANEOUS AGREEMENTS. — A contemporaneous agreement with the promoter, which gives the subscriber an option to take the shares, is no defence to a subscription unconditional on its face and on the faith of which others have subscribed. *Id.*

5. —— POWERS OF OFFICERS. — A contract to take shares of stock can not be released by the officers of the corporation without consideration and in fraud of the rights of the creditors and of the shareholders of the corporation. *Id.*

6. TRUSTS. — Stock in a corporation is a trust fund for the benefit of creditors of the corporation, and is created by an agreement to take shares of stock. *Id.*

7. DISTRIBUTION OF ASSETS. — After providing for the payment of its debts, a corporation may distribute its assets among its shareholders. *Heman* v. *Britton*, 121.

COSTS. See EXECUTIONS, 2; INFANTS, 8; INJUNCTIONS, 5, 6, 7, 8; UNLAWFUL DETAINER, 1.

1. ACTION FOR COSTS — WITNESSES. — A witness in whose favor fees are taxed in a cause may maintain an action therefor against

Digitized by Google

COSTS — Continued.

a surety for costs whose liability has become fixed by the judgment. *Garrett* v. *Cramer*, 401.

2. —— PARTIES TO — PRACTICE. — The objection that the other witnesses in the cause were not joined as parties plaintiff can not be raised for the first time on appeal. *Id.*

COUNTER-CLAIM.

1. ATTACHMENT. — A defendant who, being sued by attachment for the purchase-money of a pair of mules, sets up that at the date of the suit the sheriff took from him two mules and delivered them to the plaintiff, does not state facts constituting a counter-claim. *Meincke* v. *Bracksieck*, 315.

2. —— Under such a state of facts, the mules being in the sheriff's custody, the defendant can claim nothing for their use. *Id.*

3. BILLS — PRESENTATION. — An answer alleging the failure of the plaintiff to present to the drawer a draft delivered by the defendant to the plaintiff for collection states a cause of action arising on contract within the statute of counter-claims. *Dyas* v. *Hanson*, 363.

CREDITOR'S BILL. See EQUITY, 3, 9, 18.

CRIMINAL LAW. See CONSTITUTIONAL LAW, 1; DRAM-SHOPS; LARCENY, 1, 2, 3; PRACTICE, APPELLATE COURTS, 17; PRACTICE, TRIAL COURTS, 13, 14, 15, 16, 17, 18, 19; VENUE.

1. INSTRUCTIONS — ASSAULT. — Evidence by a defendant on trial for an assault with intent to kill, that he did not intend to hurt or kill any one, warrants an instruction for a common assault, though the evidence is that he deliberately fired a pistol at a crowd of men, striking and tearing the clothes of one of them. *The State* v. *Murphy*, 73.

2. JURISDICTION — CHANGE OF VENUE. — "An act in relation to criminal procedure in the city of St. Louis," etc., approved March 26, 1881, having been declared unconstitutional by the supreme court in *The State* v. *Kring* (74 Mo. 612), an order of the criminal court requesting the judge of the twenty-fifth judicial circuit to hear an application for a change of venue and to try the cause, was void, and did not deprive the judge of the criminal court of jurisdiction to vacate the order and dismiss the application. *The State* v. *Hayes*, 173.

3. DEGREES OF MURDER. — Provocation by words which will reduce the grade of a homicide from murder in the first to murder in the second degree, must be caused by words of the victim. *The State* v. *Lewis*, 191.

4. DELIBERATION. — Mere excitement of the accused at the time of the homicide does not negative the idea of deliberation. *Id.*

Digitized by Google

CRIMINAL LAW — Continued.

5. PREMEDITATION — INSTRUCTIONS — PRACTICE. — An instruction which erroneously defines "premeditatedly" as "thought over," is not ground for a reversal where there is no evidence of any degree of homicide other than murder in the first degree. *Id.*

6. PRACTICE. — It is not error to refuse to allow the jury, in the sheriff's custody, to visit the place of the homicide. *Id.*

7. LARCENY — EVIDENCE. — In a prosecution for larceny from a dwelling house by entering at night and ransacking rooms of the upper stories while the owners were below, it is competent to show that the wagon into which the defendant jumped to drive away, and in which he was immediately arrested, contained at the time of the arrest a billy, a pistol, and an outsider. *The State* v. *Davis*, 198.

8. VENUE — EVIDENCE. — The venue being laid in St. Louis, proof that the crime was committed on a certain street is sufficient to support a finding that the offence was committed in St. Louis. *The State* v. *Ruth*, 226.

9. RAILROADS — MISDEMEANORS. — The provisions of section 1856, of the Revised Statutes, apply to street cars. *The State* v. *Lang*, 247.

10. MURDER — INSTRUCTIONS — DELIBERATION — MITIGATING FACTS. — In a trial for murder, when the evidence tends to show that the deceased shook his finger at the defendant and used foul language to him and his companions, that an affray immediately followed in which the deceased shot one of the defendant's companions, and that the defendant stabbed the deceased from behind with a knife, the evidence as to whether the defendant attacked the deceased at all being conflicting, the court in defining murder in the second degree as murder in the first degree with the element of deliberation wanting should not merely define deliberation as meaning "in a cool state of the blood, not in sudden passion engendered by a lawful or some just provocation," but should declare to the jury as a matter of law, that the provocation as to which there was some evidence, would mitigate the homicide, and should leave it to the jury to decide whether such provocation and passion did in fact exist. *The State* v. *Rose*, 567.

11. —— It is error to instruct as to murder in the second degree where the homicide is committed under circumstances which exclude any hypothesis but that of murder in the first degree, but for the unsupported testimony of the defendant that he did not intend to kill. *The State* v. *Jones*, 589.

12. —— When there is no evidence of any other crime than murder in the first degree except the testimony of the defendant which, if believed, makes out a case of justifiable homicide, and the court correctly instructs as to murder in the first degree and as to justifiable homicide, and there is a conviction of murder in the first

Digitized by Google

CRIMINAL LAW — Continued.

degree, the giving of an instruction as to murder in the second degree is harmless, and is not ground for a reversal. *Id.*

13. —— PRESUMPTIONS. — The presumption of an intent to kill arising from the deliberate use of a deadly weapon aimed at a vital part may be rebutted by the testimony of the accused that he did not intend to kill. *Id.*

14. —— EVIDENCE. — The character of the accused for violence may be inquired into where the homicide occurs under circumstances which render it doubtful whether the act was committed in self-defence under a well grounded apprehension of immediate danger, but his character generally may not be investigated. *Id.*

15. FALSE PRETENCES. — An indictment charging that the accused obtained, by false pretences, from A the property of B is sufficient without stating the nature of A's possession. *The State* v. *Williams*, 591.

DAMAGES. See COMMON CARRIERS; CONVERSION; MASTER AND SERVANT; NEGLIGENCE; NOTICE, 4.

1. STOCK. — In an action against a railroad for damages for the killing of stock on the road, it will be presumed, after verdict, in the absence of contrary evidence, that the defendant owned the road at the time of the accident. *Brown* v. *Missouri Pacific Railway Company*, 580.

2. JUSTICES. — In such an action before a justice of the peace, a statement which substantially follows the statute is sufficient. *Id.*

3. VARIANCE. — There is no variance between an allegation that a calf was killed at a certain station, and proof that it was killed nine hundred feet distant from the station. *Id.*

4. MEASURE — PARENT AND CHILD. — Under section 2123, of the Revised Statutes, damages are not restricted to pecuniary loss, and may be awarded to the parents for the death of a child without any evidence of the present or prospective value of such child's services. *Grogan* v. *Broadway Foundry Company*, 588.

5. NEGLIGENCE — PRACTICE. — Where the tenant in possession owning certain improvements which were burned, sells the old iron in the ruins, and the purchaser, under a license from the tenant, is in possession removing the old iron, which removal, with the purchaser's knowledge, still further weakens the walls, it is properly left to the jury to determine whether such purchaser used ordinary care and prudence in such removal, and the jury are properly told that if the fall of the wall was caused by the careless removal of the iron the purchaser is liable for the damages. *Id.*

6. STOCK — BAR TO ACTIONS. — Where the owner of stock, in violation of the law, tethers his stock on the public highway, such act bars

Digitized by Google

DAMAGES — Continued.

a recovery against the railway for injuries to such stock, notwithstanding such failure to fence. *Patton* v. *West End Narrow Gauge Railway Company*, 589.

7. DOUBLE DAMAGES. — A railroad company is liable for double damages for injuries to cattle entering upon the railway tracks by reason of a failure to erect fences between the railway tracks and a contiguous parallel public highway. *Id.*

8. PERSON LIABLE. — An owner who reserves to himself no control over the execution of the work of erecting a building, but whose contract with the builder is such that if the work is carefully done in accordance with it no damage can ensue to adjoining property, is not liable for damage resulting from the manner of doing the work. *Nelson* v. *Connecticut Mutual Life Insurance Company*, 592.

9. EVIDENCE. — Proof that a wall fell by reason of an unusual storm is not necessarily fatal to a recovery for an injury occasioned by the fall, where there is evidence tending to show that the wall was too weak to withstand an ordinary storm. *Roos* v. *Clark*, 594.

DEBTOR AND CREDITOR. See EQUITY, 8, 9; MORTGAGES, 1.

DEEDS. See CONVEYANCES.

DEPOSITIONS. See EVIDENCE, 11; NOTARIES PUBLIC, 2.

PRACTICE. — Objections to the form of a question in a deposition will not be considered where the objector was present and cross-examined the witness at the taking of the deposition and made no objection then. *Lesinsky* v. *Great Western Dispatch*, 598.

DISSEISIN. See EJECTMENT, 1.

DIVORCE.

1. WITNESSES. — In an action for divorce the parties are not competent witnesses as to words spoken by one to the other while they were alone. *Miller* v. *Miller*, 418.

2. PRACTICE. — The admission of incompetent testimony which is merely cumulative and which can not prejudice the appellant, is not cause for the reversal of a decree of divorce. *Id.*

3. —— Appellate courts will, in divorce proceedings, weigh the evidence taken at the trial, but will not reverse unless the decree is manifestly for the wrong party or clearly against the weight of the evidence. *Id.*

4. —— PLEADING AND PROOF. — A defendant in a divorce proceeding can not prove indignities offered by the plaintiff unless they are pleaded. *Id.*

DONOR AND DONEE. See FRAUDULENT CONVEYANCES; GIFTS.

Digitized by Google

DRAM-SHOPS. See INJUNCTIONS, 1.

CRIMINAL LAW — EVIDENCE. — In prosecutions for the sale of liquors in quantities less than a gallon without a license therefor, the burden is on the defendant to show a license, and this applies as well to a bar-keeper as to a proprietor. *The State* v. *McNeary*, 410.

EASEMENT.

RIGHT OF WAY. — An easement of right of way can not be claimed over land which, for twenty-five years, has been used, with the claimant's knowledge and co-operation, as a stone quarry over which there was no way. *Skrainka* v. *Oertel*, 474.

EJECTMENT. See HUSBAND AND WIFE, 2; TAXES, 2.

1. DISSEISIN. — One whose enjoyment of real estate is unlawfully interfered with by the entry of another with intent to hold as owner, may elect to treat the latter as a disseisor, and may maintain ejectment. *Dyer* v. *Krackauer*, 39.

2. BACK TAXES. — A judgment against a husband for back taxes on land belonging to the wife, in an action to which she is not a party, and a sale thereunder, will not entitle the purchaser to recover in ejectment against the husband who is tenant by the curtesy initiate. *Gitchell* v. *Messmer*, 83.

3. OUTSTANDING TITLE. — An outstanding title in a third person, set up as a bar to recovery in ejectment, must be such a one as the owner thereof could recover were he the plaintiff in ejectment. *Glasgow* v. *Baker*, 201.

4. —— The owner of an outstanding title set up as a bar in ejectment must be so identified as to enable the adverse party to dispute his title by proof of abandonment or incapacity to hold title. *Id.*

5. COMMON FIELD LOTS — OCCUPATION UNDER ACT OF 1812. — The act of congress of June 13, 1812, is not a mere reservation of land from future disposition, but is a grant of the lands within its descriptive terms to the persons designated. *Id.*

6. —— EVIDENCE. — In order to make out a title under this act it must be shown, not only that the lot was cultivated prior to December 20, 1803, but, by whom the particular common-field lot was so occupied and cultivated. *Id.*

7. TAX DEEDS — EVIDENCE. — It is immaterial, in an action of ejectment begun by the original owner against the purchaser at tax sale, more than three years after the tax deed has been recorded, that the tax deed recites facts which render it voidable. *Francis* v. *Grote*, 324.

8. EVIDENCE. — A plaintiff in ejectment can not recover on the weakness of the defendant's title, but must rely on the strength of his own. *Siemers* v. *Schrader*, 346.

Digitized by Google

EJECTMENT — Continued.

9. ESTOPPEL. — The rule that one who is in possession under the plaintiff can not dispute the plaintiff's title in an action for possession, is held not to apply to this case for want of evidence of the plaintiff's title or of the defendant's possession under him. *Id.*

EJUSDEM GENERIS. See STATUTES, 3.

EQUITY. See INJUNCTIONS; MORTGAGE, 1; PRACTICE, 8; REFEREES 1, 2, 3; RECEIVERS, 1; TITLE, 1; USES AND TRUSTS.

1. CONTRACT. — A promise to pay out of a particular fund when received will be specifically enforced in equity. *Irons* v. *Price*, 179.

2. INTERPLEA — TRIPARTITE CONTRACT — ESTOPPEL — WAIVER. — An oral tripartite contract was entered into by A, a cattle dealer at Emporia, Kansas, B, a banking corporation at the same place, and C, a cattle broker at St. Louis, to the following effect: A was to make purchases of cattle and draw on C for the purchase-money and expenses; B was to advance cash on the draft, and forward it for collection, the cattle purchased being at the same time shipped to C, and a memorandum was to accompany each draft, showing that it was drawn against the shipment. Under this agreement a purchase was made of two hundred and five head of cattle; the money was advanced by B, and the cattle were duly shipped by A; but, before they reached St. Louis, C failed, and the draft was dishonored. By arrangement, the cattle were received and sold by D, the plaintiff, for account of whom it might concern. A and B interpleaded for the proceeds, and B recovered. *Held*, that the recovery was proper. A could not set up any technical rights as shipper or owner in the face of the agreement; his claim, as asserted, not being that of a general creditor, it was immaterial that B had not perfected a lien on the property. An estoppel arose in favor of B, because of the agreement and money advanced; and it was, further, immaterial that C was largely indebted to A on general account outside of this transaction. *Id.*

3. CREDITOR'S BILL. — Certificates of membership in the Merchants' Exchange of St. Louis are property, and (subject to the rules of the exchange) are liable for the debts of the owner, and may, by creditor's bill, be subjected to the payment of a judgment-creditor. *Eliot* v. *Merchants' Exchange*, 234.

4. INJUNCTION — EXECUTION. — A debtor member of the exchange may, in a proceeding in which he and the exchange are joined, be restrained from disposing of his certificate of membership, and may be compelled to transfer the certificate to such purchaser at sheriff's sale as possesses the qualifications of membership in the exchange. *Id.*

5. BACK TAXES — JUDGMENT — CONSTRUCTIVE SERVICE. — To entitle a defendant at law to relief in equity against a judgment by default

Digitized by Google

EQUITY — Continued.

on publication in an action for back taxes, fraud must appear. *Stevenson* v. *Howard*, 250.

6. —— That the defendant in the back tax proceeding was a non-resident and had not actual notice is not ground for equitable relief against the judgment. *Id.*

7. ACTIONS — PARTIES TO. — The purchaser of a judgment who acquires, by sheriff's deed, land sold thereunder, may maintain an action to set aside a fraudulent conveyance by the judgment debtor, of the land, notwithstanding the purchases were made with the money of, and in secret trust for, a third person. *Lionberger* v. *Baker*, 353.

8. Where one of two innocent persons must suffer from the act of a third person, he must suffer who, by his act, has enabled the the third person to do the wrong. *Carroll* v. *People's Railway Company*, 490; *Crews* v. *Garneau*, 606.

9. CREDITOR'S BILL — CONTRACTS — PUBLIC POLICY — FRAUD. — The profits of a contract obtained in the name of a third person who is pecuniarily irresponsible, can not be subjected to the payment of a judgment previously obtained against the ostensible contractor who had obtained no credit by reason of the contract. *Cummings* v. *Ruckert*, 557.

20. SPECIFIC PERFORMANCE. — A bill to enforce specific performance of a contract to reconvey land when the rock upon it shall have been quarried to its full depth, is a proper proceeding. There is no adequate remedy at law. *Heman* v. *Skrainka*, 577.

11. PRACTICE. — An objection to a bill in equity that there is an adequate remedy at law, can not avail to reverse the decree, if made for the first time on appeal. *Id.*

12. MARRIED WOMEN. — A decree can not be made to affect the rights of a married woman who is not before the court. *O'Fallon* v. *Clopton*, 582

13. FORECLOSURE — REDEMPTION. — Case adjudged. *Id.*

14. CLOUD UPON TITLE. — In an action to remove a cloud upon the title to real estate the plaintiff must allege and prove possession. *Charm Manufacturing Company* v. *Donovan*, 591.

15. CONVEYANCES. — A court of equity may refuse to set aside an executed conveyance, though the facts might not warrant its enforcement if it were executory. *Id.*

16. INCUMBRANCES. — A court of equity may refuse to declare void an incumbrance, upon the ground that to do so would work an injustice. *Id.*

17. FORECLOSURE. — Equity will not compel the foreclosure of a mortgage where the conditions precedent to a foreclosure have not been complied with. *Reilly* v. *Butchers and Drovers' Bank*, 598.

Digitized by Google

EQUITY — Continued.

18. EXEMPTION — CREDITOR'S BILL. — Property exempt from execution, to the head of a family, under the statute, can not be reached by a creditor's bill. *Ryan* v. *Lee*, 599.

19. —— PATENT RIGHT. — An answer alleging that "the entire property of the defendant consists of household effects not exceeding in value one hundred dollars exclusive of said patent right which is yet in an incomplete and unsatisfactory state of experimentation, and not worth in actual value one hundred dollars," sets up a good defence to a creditor's bill to reach the patent right. *Id.*

ESTOPPEL. See AGENCY, 6, 9; EJECTMENT, 9; EQUITY, 2.

1. CORPORATIONS. — A corporation, by its answer and appearance to the merits, is estopped to deny its corporate existence. *Sappington* v. *Missouri Pacific Railroad Company*, 86.

2. CONTRACT. — An estoppel arises in favor of one who advances money for the benefit of another on the faith of an agreement. *Irons* v. *Price*, 179.

3. AGENCY. — One who permits another to act as his general agent is estopped to deny the agency in a suit by one who has contracted with such person as agent of the defendant. *Watson* v. *Hoosac Tunnel Line Company*, 585.

4. CORPORATIONS — FRAUD. — One who sells goods on the credit of one who represents himself as a member of a corporation which does not in fact exist, is not estopped in a suit against such person for the purchase price to set up the facts. *Rohan* v. *Richmond*, 595.

5. —— That the creditor had brought suit against the supposed corporation which he abandoned on learning the facts, does not estop him to deny the incorporation. *Id.*

6. IN PAIS — COMPROMISE. — A compromise of a doubtful right is a good consideration for a promise, and the statement of an account between the parties after mutual compromise constitutes an estoppel *in pais*. *Hewitt* v. *Spannagel*, 600.

EVIDENCE. See BILLS, 1; CONTRACTS, 6; CRIMINAL LAW, 7; DIVORCE, 1, 2, 3, 4; DRAM-SHOPS; FRAUDULENT REPRESENTATIONS; LESSOR; PARTITION, 1; PARTNERSHIP, 2; STREETS, 7; TITLE, 1.

1. HUSBAND AND WIFE. — Evidence of what a husband said at the time of leaving, as to his reason for leaving his family, is competent as tending to show abandonment. *The State ex rel.* v. *Mertz*, 55.

2. CONTRACTS — ORAL TESTIMONY TO VARY WRITING. — The rule that oral testimony is inadmissible to vary a writing has no application to a collateral obligation which involves no departure from, but which supplements, a writing which manifestly does not contain the entire contract. *Liebke* v. *Methudy*, 65.

Digitized by Google

EVIDENCE — Continued.

3. MORTGAGES. — Oral evidence is admissible in aid of the description of property in a chattel mortgage. *The State ex rel.* v. *Cabanné*, 294; *The State to use* v. *Cabanné*, 455.

4. PRACTICE. — That a witness is permitted to testify as to the plaintiff's character in respect of that wherein it was not attacked, may not furnish ground for a reversal. *Miller* v. *Miller*, 418.

5. INDORSERS — RES GESTÆ. — The question being as to whether there was a sale and purchase of a draft, statements of the indorser as to his intention in making the transfer, made without the indorsee's knowledge, are inadmissible. *Funsten* v. *Snyder*, 446.

6. PRACTICE. — Testimony, taken at a former trial of the cause, of a witness who has since absconded, and whose address, by diligent search, can not be found, may be admitted at a subsequent trial. *Augusta Wine Company* v. *Weippert*, 483.

7. RES GESTÆ — AGENCY. — Statements or declarations made by an agent while acting within his real or ostensible authority, are admissible as a part of the *res gestæ*. *Meagher* v. *People's and Tower Grove Railway Company*, 499.

8. AGENCY. — Statements subsequently made by agents of the company who were not its agents in the transaction which involved the cause of action, are inadmissible to bind the company. *Rider* v. *Wabash, St. Louis & Pacific Railway Company*, 529.

9. LOST WRITING. — Evidence of the loss of the original writing warrants the introduction in evidence of a copy. *Conn* v. *McCullough*, 584.

10. ORAL CONTEMPORANEOUS AGREEMENTS. — In an action on a written obligation, oral testimony that at the time of the execution of the writing it was orally agreed that the payment to be made should not be made until a time subsequent to the date mentioned in the writing, is inadmissible. *Id.*

11. PRACTICE — DEPOSITIONS. — A defendant who was in court and testified, can not object for the first time, on appeal, that the signature to his deposition introduced as an admission against interest was not proved. *Chatham National Bank* v. *Goldsoll*, 586.

12. CONTRACTS. — In a suit on a contract, the defendant can not, on appeal from a justice, give evidence of a breach of another contract which was not pleaded before the justice. *Kinealy* v. *Parke*, 593.

13. DAMAGES. — The question being as to the violence of a storm at St. Louis, it is not error to exclude a report of the signal bureau as to its violence at other points. *Roos* v. *Clark*, 594.

EXECUTIONS. See ATTACHMENT, 2; EXEMPTIONS; SALES, 5; UNLAWFUL DETAINER, 1.

1. —— *Mandamus* will lie to compel the issuance of. *The State ex rel.* v. *Vogel*, 187.

Digitized by Google

EXECUTIONS — Continued.

2. COSTS — EXECUTION — PRACTICE: — In partition, an execution for costs should be against all the defendants jointly and should set out the interests of the parties, in conformity with the judgment. *Zelle* v. *Bobb*, 267.

EXECUTORS AND ADMINISTRATORS. See MORTGAGES, 4.

EXEMPTIONS.

EQUITY. — Property exempt from execution, to the head of a family, under the statute, can not be reached by a creditor's bill. *Ryan* v. *Lee*, 599.

FACTORS AND BROKERS. See AGENCY; CONVERSION; STATUTE OF FRAUDS, 2.

PROPERTY RIGHTS. — A factor who advances money to his principal upon goods shipped to him to be sold on commission becomes a special owner of the goods. *Irons* v. *Price*, 179.

FALSE PRETENCES. See CRIMINAL LAW, 15.

FERRIES. See MUNICIPAL CORPORATIONS, 1, 2.

FEDERAL REGULATION OF COMMERCE. — The right to establish ferries is within the control of the state, and is not included in the power of the federal government to regulate commerce between the states, although the ferry crosses a river which divides two states. *City of St. Louis* v. *Waterloo-Carondelet Turnpike and Ferry Company*, 216.

FINES.

EXECUTION. — A failure to issue an execution for a fine is an irregularity which in nowise affects the judgment. *Ex parte Higgins*, 601.

FORCIBLE ENTRY AND DETAINER.

1. POSSESSION. — A possession obtained by an act of trespass in building a fence is not such a possession as will support an action of forcible entry and detainer against a claimant who destroys the fence. *Dyer* v. *Reitz*, 45.

2. DISPOSSESSION. — Forcible entry and detainer will lie where the plaintiff has been dispossessed by force. *Voigt* v. *Avery*, 48.

3. DEMAND. — No written demand for possession is necessary where the original entry by the defendant was unlawful. *Id.*

FOREIGN JUDGMENTS. See RES ADJUDCATA.

JURISDICTION. — A foreign judgment rendered after a reversal and without notice can not be made the foundation of an action in this state. *Meyer* v. *Hartman*, 130.

Digitized by Google

FOREIGN STATUTES. See NOTICE, 6.

PRESUMPTIONS.—There is no presumption that the statute law of a sister state is that of the *forum*. *Rohan* v. *Richmond*, 595.

FRAUD. See ATTACHMENT, 3; EQUITY, 7, 9; FRAUDULENT CONVEYANCES; FRAUDULENT REPRESENTATIONS; GARNISHMENTS, 1, 4; INSURANCE, 1, 2; PARTITION, 1, 2; STATUTE OF FRAUDS.

EVIDENCE.—Certain facts adjudged not to show fraud. *Alexander* v. *Williams*, 13.

FRAUDULENT CONVEYANCES. See NOTICE, 2.

1. GIFTS.—A conveyance of property by a debtor who is in failing circumstances, to his daughter for one-fiftieth part of its value, is fraudulent and void as to his existing creditors. *Lionberger* v. *Baker*, 353.

2. —— DEBTOR AND CREDITOR.—One whose property is so environed that his creditors can not enforce payment of their demands, can not make a voluntary conveyance which will be good as against his existing creditors. *Id.*

3. ——That a debtor might, in time and by careful management, realize enough from his property to pay his debts, does not place him in a position to make a donation which will be good as against his existing creditors. *Id.*

4. TITLE.—A conveyance made for the purpose of preventing a judgment creditor of the grantor from reaching the grantor's interest in the land, conveys no title to one who shared in the grantor's fraudulent purpose. *Earl* v. *Hart*, 594.

FRAUDULENT REPRESENTATIONS.

CONTRACTS.—Fraudulent representations going to the essence of a contract, and on the faith of which the contract is made, furnish a cause of action, though not embodied in the written contract, and may be proved by oral testimony. *Liebke* v. *Methudy*, 65.

GARNISHMENTS. See PRACTICE, TRIAL COURTS, 20.

1. FRAUD.—The question as to a fraudulent transfer of assets may be tried in a garnishment proceeding on issues made up by the garnishee's reply to the plaintiff's denial of his answers to the interrogatories filed. *St. Louis Brokerage Company* v. *Cronin*, 587.

2. —— The plaintiff may acquire greater rights against a garnishee who is in possession of property of the defendant in execution under a fraudulent transfer than he had against the defendant himself. *Id.*

Digitized by Google

GARNISHMENTS — Continued.

3. —— PRACTICE — ANSWER. — If a garnishee's answer would not criminate him or impeach title to land, he is not excused from answering merely because the answer shows that he was a party to a fraudulent transfer of property. *Id.*

4. —— A garnishee who is a party to a fraudulent transfer of property can not retain such property as against his vendor's execution creditor because the garnishee's notes for a part of the purchase money are in the hands of persons not before the court. *Id.*

GIFTS. See FRAUDULENT CONVEYANCES, 1, 2, 3.

1. CONFIDENTIAL RELATIONS. — Proof of a gift by an aged person to the wife of her confidential agent and adviser must be clear and satisfactory. *Priest* v. *Way*, 590.

2. —— In the absence of documentary evidence or of the testimony of a disinterested witness, as to the gift, the person in possession must account for the property to the legal representatives of the alleged deceased donor. *Id.*

GUARDIAN AND WARD. See INFANTS, 4.

1. LUNATICS — POWER OF GUARDIAN — PRACTICE. — A guardian of a lunatic has no power to engage in business for his ward and is properly refused commissions for money disbursed by him in such business. *The State ex rel.* v. *Jones*, 595.

2. ANNUAL SETTLEMENTS. — An annual settlement of a guardian of a lunatic may be reviewed in an action on the guardian's bond brought before final settlement. *Id.*

3. CONVERSION. — A guardian who refuses to give his successor a schedule or to turn over the property, is guilty of a conversion. *Id.*

4. PRESUMPTIONS. — There being no evidence that the guardian of a lunatic had attempted to collect the choses in action, and no evidence of their value, the referee in an action on the guardian's bond correctly presumes they are worth their face value and interest. *Id.*

HABEAS CORPUS.

1. CONSTITUTIONAL LAW. — A prisoner having been committed for trial on a charge of obtaining money by means of a bogus instrument of writing, the question as to which of two repugnant sections of the statute prevail does not arise in a *habeas corpus* proceeding. *In re Bouquette*, 576.

2. PRACTICE. — A man imprisoned for a criminal offence will not be discharged under a writ of *habeas corpus* for a mere irregularity in the commitment. *Id.*

Digitized by Google

HUSBAND AND WIFE. See EJECTMENT, 2; MARRIED WOMEN; NOTICE, 2; TAXES, 7.

1. TENANT BY CURTESY. — During coverture, where issue is born alive of the marriage, the husband is not a tenant by the curtesy, of his wife's lands, but is seised only by the right of his wife. *Dyer* v. *Wittler*, 52.

2. —— SEISIN — ACTIONS. — Their seisin is joint, and if they are disseised they must jointly sue to recover possession. *Id.*

3. —— The children in such a case have no right of entry or of action upon the death of the wife, the husband surviving. *Id.*

4. —— LIMITATIONS. — Upon the death of the husband after the wife, in such case, the children, though infants, may sue within such time as, rejecting the period during which the life estate of the father barred their right of entry, would be within twenty-four years from the beginning of the adverse possession of the defendant. *Id.*

5. ACTIONS — PARTIES. — In an action on a constable's bond, for an illegal levy upon the earnings of a wife and minor children whose husband and father had abandoned them, the husband is not a necessary party as a relator of the plaintiff. *The State to use* v. *Mertz*, 55.

6. —— ABANDONMENT. — In such a proceeding it is immaterial that a judicial finding of abandonment and a decree for maintenance, under the statute, has not been had. *Id.*

7. —— EVIDENCE. — Evidence of what the husband said at the time of leaving, as to his reason for leaving his family, is competent to show abandonment. *Id.*

8. MARRIED WOMEN — WITNESSES. — In an action against the husband, the wife is not a competent witness, though her testimony is to the effect that the right is in her and not in the husband. *Brinsmade* v. *Groll*, 444.

INDICTMENT. See CRIMINAL LAW, 15; LARCENY, 1.

INDORSER AND INDORSEE. See EVIDENCE, 5.

INFANTS.

1. As to limitations of actions of ejectment. See HUSBAND AND WIFE, 4.

2. JUDGMENTS. — Judgment against an infant based upon the appear ance of the infant by his guardian without previous service upon the infant, is void under the present statute. *Nagel* v. *Schilling*, 576.

3. COSTS. — The proper defence of a suit against an infant is a necessity, for the cost of which the estate may be liable. *Id.*

Digitized by Google

INFANTS — Continued.

4. PRESUMPTIONS. —A request for the defence of such a suit may be presumed from the necessities of the case, taken in connection with the exercise of discretion by the guardian *ad litem* in engaging for such defence the services of the law firm of which he is a member. *Id.*

INJUNCTION. See EQUITY, 4.

1. EQUITY — NUISANCE — DRAM-SHOPS. — Equity will not restrain the keeping of an unlicensed dram-shop, though the keeping of it is a public nuisance. *The State ex rel.* v. *Uhrig*, 418.

2. —— A writ of injunction will not be issued where the result would be oppressive upon the defendant, or where the plaintiff by reason of his own acts, ought not, in good conscience to ask it. *Skrainka* v. *Oertel*, 474.

3. DAMAGES. —Actual loss of time to the defendant in procuring a dissolution of the temporary injunction is an element of damages recoverable on the bond. *Id.*

4. COSTS. — No costs are taxable against the sureties on an injunction bond except such as are occasioned by the injunction. *Lewis* v. *Leahey*, 564.

5. —— Costs of the suit to which the injunction is a mere incident are not taxable on the injunction bond. *Id.*

6. ——All costs accruing between the granting of a restraining order and its dissolution are properly taxed against the sureties on the injunction bond. *Id.*

7. —— That the questions on the motion to dissolve the injunction and on the merits of the action are heard together, is immaterial in taxing the costs against the sureties on the bond, unless the costs on question of dissolution are thereby increased. *Id.*

8. NUISANCE. — Where it is clear that the striking of a clock and the ringing of a chime of bells from a church tower interferes with the physical comfort of ordinary persons living adjacent thereto, an injunction will lie to restrain the striking of the clock during the night, and the ringing of the chimes except as a summons to religious worship. *Leete* v. *Pilgrim Congregational Society*, 590.

INSTRUCTIONS. See PRACTICE, 1, 10, 13.

1. Bad grammar does not vitiate an instruction, if the meaning thereof is not obscured. *The State* v. *Smith*, 585.

2. Instructions not warranted by the evidence are properly refused. *Hildreth Printing Company* v. *Stokes*, 591.

3. That which is omitted in one instruction may be supplied by another, and if the whole are consistent and correct, it is sufficient. *Roos* v. *Clark*, 594.

Digitized by Google

INSTRUCTIONS — Continued.

4. An instruction which assumes as proved a controverted material fact, is properly refused. *Cahill* v. *Liggett & Myers Tobacco Company*, 596.

INSURANCE.

1. —— FRAUD — CORPORATIONS — PUBLIC POLICY — CONTRACTS. — A transaction made in good faith, whereby a corporation not alleged to be insolvent, having a controlling interest in another corporation, after the demand of a special statement from the latter by the superintendent of insurance, delays that statement, and without removing the assets of either corporation from the reach of the superintendent of insurance, proceeds to reinsure the risks of the second company, absorbing its assets *pro rata* as it assumes its burdens, is not necessarily void as in fraud of the insurance law or as against public policy. *Alexander* v. *Williams*, 13.

2. —— It not having appeared that there was any intention to hinder, delay, or defraud the creditors of the Columbia; or that the insolvency of either company was brought about by the transaction, or that the creditors of the Columbia were injured by the transaction, or would have been injured had it been completed; or that the assets transferred for the liabilities assumed were out of proportion to the assets left for the liabilities remaining; or that the contract was oppressive or unfair to the Columbia, or to her creditors or stockholders; the fact that the Columbia's receiver, in the course of subsequent litigation, established a claim against the Life Association of a million dollars for another transaction, as to which at the time it was made, neither corporation recognized any liability, can not, by an *ex post facto* operation, be held to show intent to defraud the creditors of the Columbia in the transfer of assets. *Id.*

INTEREST. See JUDGMENTS, 3.

INTERPLEAS. See EQUITY, 2.

JUDGMENTS. See ATTACHMENTS, 2; EQUITY, 5, 6; INFANTS, 2; JUSTICES, 4; MANDAMUS, 1; PRACTICE, 2; SALES, 5.

1. COLLATERAL ATTACK. — Advantage may be taken of a void judgment in a collateral proceeding, even though jurisdiction of the person appears affirmatively from the record. *Meyer* v. *Hartman*, 180.

2. ERRORS OF FACT — WANT OF NOTICE. — A judgment in a proceeding to collect back taxes, rendered upon service by publication, the order of publication being made upon a false return by the sheriff, is rendered upon an error of fact, where it appears that the defendant was at all times a resident of the bailiwick. *The State ex rel.* v. *Heinrich*, 146.

Digitized by Google

JUDGMENTS — Continued.

3. INTEREST. — Every judgment in a civil action bears interest, though it be not therein expressed, at the rate which the cause of action bore. *The State ex rel.* v. *Vogel*, 187.

4. —— PRACTICE — CLERKS. — The judgment being silent as to interest, it is the duty of the clerk to ascertain from the record the rate of interest which it bears. *Id.*

5. ADMINISTRATION. — An order upon an administrator by the probate court, to pay over a sum of money, is a judgment. *Id.*

6. APPEALS — SUPERSEDEAS. — The lien of a judgment is not, by the taking of an appeal which operates as a *supersedeas*, extended beyond the statutory period of three years. *Christy* v. *Flanagan*, 253.

7. ASSIGNMENT OF. — The assignee, for value, of a judgment has all the legal remedies for enforcing it which the original judgment creditor had. *Lionberger* v. *Baker*, 353.

8. COLLATERAL ATTACK. — The objection that a judgment is excessive can not be raised in a collateral proceeding. *Howard* v. *Still*, 584.

9. JUSTICES — APPEALS. — A justice's docket entry, "Plaintiff produced a copy of the contract in evidence, to which defendant objected, because the original should be produced; plaintiff neglected to have taken the legal steps to have said original contract produced in court, whereupon it is adjudged by the justice that the case be dismissed at plaintiff 's cost," is a final judgment of nonsuit, from which an appeal lies. *Bryce* v. *Foy*, 593.

JUDICIAL NOTICE. See NOTICE, 6; STREETS, 5.

JURISDICTION. See CRIMINAL LAW, 2.

NOTICE. — Where the statute provides that jurisdiction of the circuit court shall not attach, except upon notice to the adverse party, after a reversal of the judgment on appeal, if such notice is not given, further proceedings in the circuit court are void. *Meyer* v. *Hartman*, 130.

JURY. See NEGLIGENCE, 10; PRACTICE, 7, 8; PRACTICE, TRIAL COURTS, 19.

1. CASE CONSIDERED. — The case of *Weil* v. *Kume* (49 Mo. 148), considered and held to be in disaccord with the earlier and more recent decisions on the question of the right of trial by jury. *Smith* v. *St. Louis Beef Canning Company*, 522.

2. WAIVER — INSURANCE. — Whether a retention of proofs of loss by an insurer for a length of time is a waiver of defects of proof is a question for the jury. — *Cramer* v. *People's Insurance Company*, 584.

Digitized by Google

JUSTICES OF THE PEACE. See APPEALS, 3; DAMAGES, 2; JUDGMENTS, 9; UNLAWFUL DETAINER, 1, 2.

1. STATEMENT. — The statement, "August Gorla to Henry Strathmann, Dr., to one-half amount of judgment for debt and costs in favor of G. E. Smith and against said Strathmann, in case No. 84, August, 1880, before Von Gerichten, J. P., instituted by Smith against Strathmann & Gorla on their joint contract. Total amount, $44.30 — $22.15," is a sufficient statement of a cause of action before a justice of the peace. Lewis, P. J., dissenting. *Strathmann* v. *Gorla*, 1.

2. CHANGE OF VENUE — WAIVER. — The requirement that, on change of venue, the papers must be sent to the nearest justice, is not jurisdictional, and is waived by an appeal. *Voigt* v. *Avery*, 48.

3. —— Such an irregularity is waived by an appearance to the merits before the justice to whom the papers are sent. *Id.*

4. JUDGMENTS. — That a judgment is entered by a justice's clerk is immaterial, if entered in the name and by direction of the justice. *Cabanné* v. *Spaulding*, 312.

5. STATEMENT. — A statement, before a justice, that the "defendant is justly indebted to the plaintiff in the sum of $162, for money had and received heretofore, to wit: on the — day of ——, 1882," is not sufficient to support a judgment for the plaintiff. *Rosenberg* v *Boyd*, 429.

6. STATEMENT. — A statement which will apprise the defendant of the subject-matter of the suit and which will bar another action is sufficient, in an action before a justice of the peace. *Dewey* v. *Massingale*, 579.

7. CONTINUANCE. — That a cause which was pending at the death of a justice was not called before his successor on the day to which it was continued, is not ground for dismissal on appeal, where the parties appeared at the trial. *Martin* v. *Prietto*, 596.

LANDS. See EJECTMENT, 5; HUSBAND AND WIFE, 1, 2, 3, 4; TITLE, 1, 4.

LARCENY. See CRIMINAL LAW, 7.

1. INDICTMENT. — An indictment for larceny in a dwelling house, is not bad after verdict because of the addition of the words "room and building" after the words "dwelling house." *The State* v. *Smith, alias Shepard*, 585.

2. DWELLING. — Larceny in a dwelling house is grand larceny, irrespective of the value of the property stolen. *Id.*

3. —— A room in which a person sleeps and lives is a dwelling house within the meaning of the statute, though it is in a building other rooms in which are devoted to business purposes. *Id.*

Digitized by Google

LESSOR AND LESSEE.

DESCRIPTION. — In an action for rent by a lessor who has executed the contract by putting the lessee in possession, that the property is not described with such accuracy as to enable a third person to identify it without the aid of oral testimony will not avail as a defence. *Hoyle* v. *Bush*, 408.

LEVY. See HUSBAND AND WIFE, 5.

LIBEL.

PRIVILEGED COMMUNICATION. — Words in a petition filed in a civil action charging that the defendant in the action is insolvent, are privileged, and can not be made the subject of an action for libel or for malicious prosecution. *Rubelman* v. *Luehman*, 601.

LICENSES. See STATUTES, 4.

LIENS. See MECHANICS' LIENS.

LIMITATIONS. See HUSBAND AND WIFE.

LUNATICS. See GUARDIAN AND WARD.

MALICIOUS PROSECUTION. See LIBEL.

MANDAMUS.

1. JUDGMENTS — INTEREST — EXECUTIONS. — A judgment founded up- another judgment which bore ten per cent interest, being paid with six per cent thereon, *mandamus* will lie to compel the clerk of the court to issue execution for the balance of four per cent. *The State ex rel.* v. *Vogel*, 187.

2. NUNC PRO TUNC. — *Mandamus* will not be awarded to compel the successor of a judge whose term had expired, to make a *nunc pro tunc* entry, where the minute entry had been cancelled by direction of the judge a few days after it was made, where the judge's recollection is that the order was not made, and where the clerk testifies that his attention was distracted at the time the minute entry was made; although the relator's attorney testifies positively that he distinctly heard the court make the order in open court. *The State ex rel.* v. *Lubke*, 587.

MARRIED WOMEN. See HUSBAND AND WIFE, 8; PRACTICE, APPELLATE COURTS, 14; PRACTICE, 9.

1. EQUITY. — The rights of a married woman can not be affected by a decree in a proceeding to which she is not a party. *O'Fallon* v. *Clopton*, 582.

2. HUSBAND AND WIFE. — Where a married woman had, for a long time, done business on her own account and in her own name, and had lent money in her own name, to warrant an instruction on the theory that the money thus lent belonged to her husband, there

Digitized by Google

MARRIED WOMEN — Continued.

must be substantial proof to that effect. *The State to use* v. *Gregory*, 583.

3. USES AND TRUSTS. — A married woman may, under the statute, create a trust in respect of her separate property without her husband's co-operation. *Daily* v. *Singer Manufacturing Company*, 597.

MASTER AND SERVANT. See NOTICE, 3, 4.

1. NEGLIGENCE. — A master is not liable for an injury inflicted by a servant upon a fellow-servant, where the act which causes the injury is not within the scope of the servant's duty. *Pettigrew* v. *St. Louis Steel and Ore Company*, 441.

2. CONTRACT OF HIRING — BAR TO ACTIONS. — A recovery by a servant for a breach of contract of hiring, in an action brought before the termination of the period for which he was hired, is a bar to a subsequent action for a breach of the same contract. *Soursin* v. *Salorgne*, 486.

3. ——DAMAGES. — In an action so brought after a wrongful discharge of the servant, the recovery is for damages, and not for wages for constructive service. *Id.*

4. —— A servant can not, after his discharge, treat the contract as still subsisting, remain in voluntary idleness, and recover for constructive service. *Id.*

5. NOTICE. — A master is bound to notify an inexperienced servant of the dangerous character of the work about which he is employed. *Dowling* v. *Allen*, 590.

6. ——That a servant is seventeen years of age, and intelligent, and knows of the existence of a set screw in a revolving shaft is not conclusive of a knowledge of the danger of the work. *Id.*

7. JURY. — The question whether under such circumstances the servant was taking a known risk in walking over the shaft is a question for the jury. *Id.*

8. NOTICE — A master is not bound to explain to his servant, who is a man of ordinary intelligence, apparent dangers in the use of machinery. *Wolter* v. *Harrison Wire Company*, 592.

9. CONTRIBUTORY NEGLIGENCE. — The failure of a servant to use proper appliances provided for the prevention of injury in the use of machinery, in consequence of which failure he is injured, is such contributory negligence as will prevent a recovery. *Id.*

MECHANIC'S LIENS.

1. WHAT CREATES. — Though a contract is necessary to the establishment of a mechanic's lien, the lien is created, not by the contract, but by furnishing the materials and doing the work. *Hannon* v. *Logan*, 83.

Digitized by Google

MECHANIC'S LIENS — Continued.

2. CONTRACT — TWO HOUSES. — It is immaterial whether the contract between the contractor and the sub-contractor was to do the work on two houses for a given sum, or to do the work on each of the two for one-half of that sum, if the work done on each was done by actual count and measurement. *Id.*

3. AMENDMENTS — PLEADINGS. — In actions on liens, the power of amendments will be liberally exercised to save a limitation. *Id.*

4. STATEMENT OF ACCOUNT. — An account filed as the foundation of a mechanic's lien, which contains a general charge, including an item for which no lien is given, will not support a lien. *Nelson* v. *Withrow*, 270.

5. —— Defects in such an account are not cured by oral evidence from which the jury may separate the items for which a lien is given from those for which a lien is not given. *Id.*

6. —— A sub-contractor's account which refers for its items to the contract between the contractor and the sub-contractor is not a sufficient basis for a lien. *Id.*

7. —— The amount of the lien charge must certainly and definitely appear from the account filed. *Id.*

8. APPLICATION OF PAYMENTS. — A payment by the owner to a sub-contractor without directions as to its application will be applied to those items for which the sub-contractor has a lien right. *Id.*

9. EXTRA WORK. — A mechanic who, while erecting a building under a written contract, agrees orally with the owner to build and does build an additional room which is made a part of the original building, is entitled to a lien on the whole building for the work done under the oral agreement. *Sontag* v. *Doerge*, 577.

10. PARTIES. — One who has become owner since a mechanic's lien attached is not a necessary party to a suit to enforce the lien. *Koenig* v. *Boehme*, 593.

11. NOTICE. — Notice of an intention to file a mechanic's lien is properly given to the person who was owner when the work was begun though the title has since passed to another. *Id.*

MISDEMEANORS. See CRIMINAL LAW.

MORTGAGES AND DEEDS OF TRUST. See EQUITY, 17; NOTICE, 1.

1. DEBTOR AND CREDITOR — REDEMPTION — EQUITY. — A creditor at large can not redeem his debtor's mortgaged land situated in another state, in a proceeding in which the debtor is not served with process. *Harris* v. *Burns*, 229.

2. CHATTEL MORTGAGE — DESCRIPTION — EVIDENCE. — A description of property conveyed by a chattel mortgage is sufficient if it can be identified by a third person upon reasonable inquiry, and oral

Digitized by Google

MORTGAGES AND DEEDS OF TRUSTS — Continued.
testimony in aid of the description is admissible. *The State ex rel.* v. *Cabanné*, 294; *The State to use* v. *Cabanné*, 455.

3. STIPULATIONS FOR INSURANCE — ACTIONS — A *cestui que trust* who advances money to pay insurance under a stipulation in the deed of trust that he may insure the property upon the mortgageor's failure to insure, and that "the sums so expended, with ten per cent interest per annum thereon, shall become a debt due additional to the principal indebtedness," may proceed by an action for money paid out for the mortgageor at his instance, without waiting to foreclose the mortgage or for the maturity of the principal indebtedness. *Cassatt* v. *Vogel*, 317.

4. —— EXECUTORS AND ADMINISTRATORS. — For advances so made by the beneficiary after the mortgageor's death, the remedy is against the mortgageor's executor, who is bound to do that which his testator undertook to do. *Id.*

5. DESCRIPTION. — That property is technically misdescribed in a chattel mortgage is immaterial where the intention of the parties that it should pass under the mortgage is clear. *The State, to use* v. *Cabanné*, 455.

6. NOTICE. — The recording of a chattel mortgage imparts notice to the mortgageor's subsequent creditors. *Long* v. *Uhlich*, 594.

7. WAIVER. — Indulgence as to time, given by a chattel mortgageor, is not a waiver of the security. *Daily* v. *Singer Manufacturing Company*, 597.

MUNICIPAL CORPORATIONS. See POLICE; STATUTES, 4; STREETS, 10.

1. CONSTITUTIONAL LAW — ORDINANCE — FERRIES. — An ordinance passed in pursuance of provisions of a municipal charter which authorizes the licensing of ferries within the city, does not violate the constitutional inhibition against the passage, by the legislature, of local or special laws. *City of St. Louis* v. *Waterloo-Carondelet Turnpike & Ferry Company*, 216.

2. —— An ordinance fixing a penalty for operating a ferry within the city limits, passed in pursuance of charter provisions, may be enforced, though the ordinance contains special provisions applicable only to a particular ferry. *Id.*

3. CONSTITUTIONAL LAW — ORDINANCES. — Where the provisions of an ordinance are separable the whole will not be declared void because of the unconstitutionality of a part. *City of St. Louis* v. *St. Louis Railroad Company*, 221.

4. ORDINANCES — RAILROADS. — A municipal requirement that all trains propelled by steam shall sound the bell, and shall have a brakeman and a lookout thereon, is not void for unreasonableness. *Merz* v. *Missouri Pacific Railway Company*, 459.

Digitized by Google

MUNICIPAL CORPORATIONS — Continued.

5. ——That such a requirement applies to trains moving over grounds of the defendant, which are open to the public, does not involve any property rights nor exonerate the defendant from the duty of observing the regulation. *Id.*

6. ——POLICE POWER. — The city of St. Louis may, under its charter, pass such an ordinance as a police regulation. *Id.*

7. —— DAMAGES. — A municipal corporation can not limit its liability by the passage of an ordinance limiting a time during which it shall not be liable for damages occasioned by the falling of dangerous walls which it has allowed to remain standing. *Grogan* v. *Broadway Foundry Company*, 588.

MURDER. See CRIMINAL; LAW.

NEGLIGENCE. See DAMAGES; MASTER AND SERVANT, 1, 9. NOTICE, 4.

1. DAMAGES — TRESPASS. — A petition which states that the plaintiff was building a house under a contract to finish the same within a given time or forfeit a sum certain for a delay beyond such time, and that by reason of the adjoining owner's negligence his wall fell upon the plaintiff's materials and occasioned loss by delaying the work, states a good cause of action. *Lynds* v. *Clark*, 74.

2. —— It is immaterial that, on such a state of facts, the plaintiff could not have recovered in an action of trespass at common law. *Id.*

3. —— CONTRIBUTORY NEGLIGENCE. — The mere fact that the plaintiff proceeds with the work after he knows the dangerous condition of the wall and after the defendant has promised to remove it, is not such contributory negligence as will prevent a recovery. *Id.*

4. —— The plaintiff, on the facts, might presume that the defendant would exercise ordinary care, and he took only the risk of injury from pure accident. *Id.*

5. —— Evidence that a fire began on the defendant's land just after the passage of its locomotive and spread to and burned the plaintiff's property on adjoining land, makes a *prima facie* case. *Sappington* v. *Missouri Pacific Railroad Company*, 86.

6. —— BURDEN OF PROOF. — A *prima facie* case being made, the burden is on the defendant to show that the escape of sparks from the passing locomotive was not the result of its negligence. *Id.*

7. —— PRACTICE. — A *prima facie* case being made by the plaintiff and the defendant having shown that its locomotive was of the most improved pattern, the question of negligence is for the jury. *Id.*

8. ——SEVERAL ACTS OF NEGLIGENCE BY SEVERAL DEFENDANTS. — Where a building contractor negligently suspends the guy rope of

Digitized by Google

NEGLIGENCE — Continued.

a derrick too low for a street car to pass under it, and the driver of the car negligently drives against the rope so as to cause the derrick to fall upon and kill a passenger on the car, both the contractor and the railway corporation may be held liable in an action by the widow of the deceased passenger. *Kent* v. *Missouri Railroad Company*, 160.

9. CONTRIBUTORY NEGLIGENCE. — In the absence of any regulation forbidding passengers to ride on the platform of a street car, contributory negligence can not be imputed to a passenger from the fact of his being injured while so riding on the platform. *Id.*

10. PROOF. — Though all the witnesses may testify that there was no negligence on the part of the defendant, the jury may nevertheless find that there was negligence, if the physical facts of the case and the manner of the injury raise a necessary inference to that effect. *Id.*

11. DAMAGES — PUBLIC CONTRACTOR. — A contract with a municipality for the repairing of street lamp posts and lighting the lamps, raises a public duty on the part of the contractor to be performed for the benefit of the citizens of the municipality distributively. *Lampert* v. *Laclede Gas-Light Company*, 376.

12. —— PLEADING. — A recovery may be had by one who has been injured by reason of the negligent non-performance of such duty, in an action which proceeds as for a non-performance of public duty, and which sets up the contract by way of inducement. *Id.*

13. —— BAILMENT — BURDEN OF PROOF. — A bailee of a chattel received in good condition and injured while in his possession in a manner which tends to show culpable negligence on his part, must show such facts as will exonerate him. *Arnot* v. *Branconier*, 481.

14. —— Proof that the defendant hired of the plaintiff, a livery stable keeper, a horse and buggy to take a drive; that he failed to return them; and that they were subsequently found in the suburbs of the city in a badly damaged condition, makes a *prima facie* case in an action by the bailor for damages. *Id.*

15. CONTRIBUTORY NEGLIGENCE. — There can be no recovery for an injury to which the plaintiff's negligence directly contributed. *Schoenlau* v. *Friese*, 436.

16. RAILROADS — DAMAGES. — A failure, in violation of municipal regulations, to keep a brakeman and lookout on the train, which contributes directly to the injury, may render the defendant liable, notwithstanding the plaintiff's negligence in not looking for the train, if, by the observance of such regulation the accident could have been avoided. *Merz* v. *Missouri Pacific Railway Company*, 459.

Digitized by Google

NEGLIGENCE — Continued.

17. —— It is negligence for a railroad company to send its detached cars, without a brakeman, over its own grounds which are open to the public in the city of St. Louis. *Id.*

18. CONTRIBUTORY. — Contributory negligence of a child killed by a street railroad car will not prevent a recovery if the driver of the car could, by the exercise of reasonable care, have seen the child and avoided the injury. *Pearson* v. *Union Railway Company*, 580.

19. —— PRACTICE. — Contributory negligence being shown, and there being substantial evidence of want of care on the part of the driver, the case is properly submitted to the jury. *Id.*

20. —— Slight contributory negligence on the part of the plaintiff will not necessarily bar a recovery. *Peters* v. *Harrison Wire Company*, 599.

21. —— PRACTICE. — In an action for damages for personal injury, it is not error to refuse to take the case from the jury, though there is substantial evidence of contributory negligence, if, from the evidence, there is not a necessary inference that the injury was caused by the plaintiff's negligence. *Id.*

22. —— Case adjudged as to facts which will support a verdict for the plaintiff. *Id*

NEGOTIABLE INSTRUMENTS. See PARTNERSHIP, 1; PROTEST; STOCKHOLDERS, 8.

1. INSURANCE COMPANIES, POWERS OF. — Insurance companies have, in the general conduct of their business, the power to take, hold, and negotiate negotiable paper. *Alexander* v. *Rollins*, 109.

2. STOCK NOTES. — Stock notes of a mutual insurance company which are negotiable in form are negotiable in fact. *Id.*

3. —— NOTICE — FRAUD. — A payment by the maker to the fraudulent holder of a negotiable note without notice of the fraud, discharges the maker from liability thereon to the payee. *Id.*

NEW TRIAL. See PRACTICE, 6; PRACTICE, TRIAL COURTS, 8, 12, 16, 19, 23.

1. PRACTICE. — A new trial will not be granted because of remarks made by witnesses, out of court, in the hearing of the jurors, unless such remarks have an apparent tendency to prejudice the losing party. *Fendler* v. *Dewald*, 60.

2. —— It is not an abuse of discretion to refuse a new trial asked because counsel refused to examine witnesses in attendance and whose testimony the client requested him to take. *Miller* v. *Miller*, 418.

3. —— The refusal to grant a new trial on the ground of newly discov-

Digitized by Google

NEW TRIAL — Continued.

ered evidence is not ground for a reversal where it does not appear that such evidence would probably change the result. *Schoenlau* v. *Friese*, 436.

NOTARIES PUBLIC. See PROTEST.

1. WITNESSES — DEPOSITION — CONTEMPT. — A commitment of a witness for a refusal to testify, issued by a notary public who has no power to take the testimony, is void. *In re Nitsche*, 218.

2. —— JURISDICTION. — A notary public has no power to take depositions in a proceeding pending in another state until he has received a *dedimus* from such other state.

3. —— Parties to the suit can not by consent confer such jurisdiction. *Id.*

NOTICE. AGENCY, 8; MORTGAGES, 6; NEGOTIABLE INSTRUMENTS, 3; PRACTICE, TRIAL COURTS, 9; STOCKHOLDERS, 9; STREETS, 5, 9.

1. COMPUTATION OF TIME — An advertisement published for the first time on May 14th for a sale on June 2d, is not made in compliance with the terms of a deed which requires twenty days' notice to be given. *Siemers* v. *Schrader*, 346.

2. HUSBAND AND WIFE. — The husband of a grantee in a voluntary conveyance of real estate who, before his marriage, had notice of a proceeding to set aside the conveyance for fraud, is not a purchaser for value without notice, though there was an oral promise of marriage between him and the grantee before notice. *Lionberger* v. *Baker*, 353.

3. AGENCY — MASTER AND SERVANT. — Notice to a servant of a corporation which will affect the corporation must be shown to relate to something within the scope of the servant's duty. *Lampert* v. *Laclede Gas-Light Company*, 376.

4. —— NEGLIGENCE. — Fifteen minutes from the time at which a lamplighter completed the lighting of the lamps, held not to be a reasonable time within which to give notice to the corporation of of the fall of a lamp post, under the circumstances of the case. *Id.*

5 AGENCY — CORPORATIONS. — Knowledge possessed by a secretary of a corporation of facts coming within the scope of his business and duties as such secretary, will bind the corporation. *Carroll* v. *People's Railway Company*, 490.

6. FOREIGN STATUTES. — Appellate courts do not take judicial notice of the statutes of other states. *Rohan* v. *Richmond*, 595.

NUISANCE. See INJUNCTIONS, 1, 8.

1. LANDLORD AND TENANT. — The owner of premises demised to a tenant for a term of years is not liable for a nuisance created and maintained by the tenant. *Grogan* v. *Broadway Foundry Company*, 588.

Digitized by Google

NUISANCE — Continued.

2. PARTIES. — In such a case, that the city is liable in an action for damages for the nuisance does not make the owner a necessary party defendant under the charter of the city of St. Louis. *Id.*

NUNC PRO TUNC ENTRIES. See MANDAMUS 2.

OFFICERS. See SHERIFFS.

1. TENURE OF OFFICE. See POLICE, 1, 2.

2. SALARY. — A charter provision prohibited any change in the salary of a city officer during his term of office. The officer's term of office was four years "and until his successor shall be elected and qualified." The salary of the office was increased during the four-year term. *Held*, that the officer was entitled to the increased salary for a time during which he held over after the expiration of the four-year term. *The State ex rel.* v. *Smith*, 589.

ORDINANCES. See CONSTITUTIONAL LAW, 2; MUNICIPAL COPORATIONS, 1, 2, 3.

POLICE JUSTICES. — An ordinance which provides that police justices shall forthwith issue execution for fines imposed, does not deprive the justices of their discretionary power to grant reprieves. *Ex parte Higgins*, 601.

PARDONS.

1. FINES. — A writing by the mayor licensing the person named to remain in town so long as he shall behave himself well, is neither a pardon nor a remission of a fine to which the writing in no way refers. *Ex parte Higgins*, 601.

2. —— Pardons being in derogation of law, to be valid and of effect, must accurately describe the offence intended to be forgiven. *Id.*

PARENT AND CHILD. See DAMAGES, 4.

PARTIES TO ACTIONS. COSTS, 1; EQUITY, 7; HUSBAND AND WIFE, 2, 5; NUISANCE, 2.

PARTITION. See APPEALS, 2; EXECUTIONS, 2.

1. ATTORNEYS — FRAUD — BURDEN OF PROOF. — The burden is on a purchaser at partition sale, who was also the plaintiff's attorney in the partition proceeding, to show that the sale was as advantageous as could by due diligence have been made. *Burke* v. *Daly*, 542.

2. —— Such a sale will be set aside where, by the negligence of their attorney, the minor defendants were not represented at the sale, where no effort was made to secure bidders, and where the property did not sell for its reasonable value. *Id.*

Digitized by Google

PARTITION — Continued.

3. COSTS — ATTORNEY'S FEE. — An attorney's fee can not be taxed as costs in a partition proceeding unless a contract between the attorney and the party to the suit be shown, but such contract need not be in writing. *Frank* v. *Crawford*, 599.

PARTNERSHIP. See CONTRACTS, 3.

1. NEGOTIABLE PAPER. — A note executed by one partner, in the firm name, for property likely to be used in the copartnership business, will bind the firm, in the absence of the payee's knowledge at the time that it was made for the benefit of the member of the firm who executed it. *Augusta Wine Company* v. *Weippert*, 488.

2. WITNESSES. — A former partner is, after dissolution of the copartnership, competent to prove the existence of the copartnership. *Williamson-Stewart Paper Company* v. *Hilder*, 596.

PATENTS. See EQUITY.

PAYMENTS.

How applied. See *Nelson* v. *Withrow*, 270.

PLEADINGS. — See AMENDMENTS, 1, 2; DIVORCE, 4; NEGLIGENCE, 12; PRACTICE, 9; STREETS, 4.

1. WAIVER — PRACTICE. — An answer is a waiver of all merely formal defects in a petition which states a cause of action. *Sappington* v. *Missouri Pacific Railroad Company*, 86.

2. PRESUMPTIONS. — Presumptions are not indulged in favor of a pleading. *The State ex rel.* v. *Central St. Louis Masonic Hall Association*, 597.

POLICE. See ORDINANCES.

1. POWER OF POLICE COMMISSIONERS. — The power of the police commissioners of St. Louis to appoint a chief of police "for such time as the board shall determine," does not include the power to discharge and appoint a chief of police at their pleasure. *The State ex rel.* v. *Police Commissioners*, 297.

2. —— An appointment of a chief of police without specifying the duration of the term, is not void, and the commissioners can not remove such an appointee at their pleasure. *Id.*

3. —— A chief of police can not be removed by the commissioners before the expiration of his term of office, except for specified causes. *Id.*

4. CHIEF OF POLICE — TERM OF OFFICE. — The statutory limitation of the term of office of a chief of police is four years, where the term of his tenure is not otherwise fixed by the order of his appointment. *Id.*

5. PRESUMPTIONS — CERTIORARI. — In proceedings by *certiorari* it will not be presumed from a record which shows merely the removal of an officer, that such removal was for cause shown. *Id.*

Digitized by Google

POLICE — Continued.

6. PRACTICE. — In such a proceeding such a record will be quashed. *Id.*

POSSESSION. See EJECTMENT, 1; FORCIBLE ENTRY, 1; HUSBAND AND WIFE, 1, 2; TITLE, 1.

PRACTICE. See AMENDMENTS, 1, 2, 3; BAILMENTS, 3; BILLS, 5, 6; BILLS OF EXCEPTIONS, 1, 2, 3; CRIMINAL LAW, 2; DIVORCE, 2, 4; EXECUTIONS, 2; JUDGMENTS, 4; JURY, 2; NEGLIGENCE, 10; NEW TRIALS; QUANTUM MERUIT; STOCKHOLDERS, 11, 18.

1. INSTRUCTIONS. — A cause will not be reversed for omissions or defects in an instruction, if they are supplied or corrected in other instructions, and the instructions given are fair, consistent, and not misleading. *Sappington* v. *Missouri Pacific Railroad Company*, 86.

2. ABUSE OF DISCRETION. — A refusal by the trial court to vacate a judgment upon full and uncontradicted evidence of an error of fact by reason of which the defendant had no notice of the action against him, is a sufficient ground for a reversal of the judgment for an abuse of discretion by the trial court. *The State ex rel.* v. *Heinrich*, 146.

3. SEPARATE TRIALS. — An exercise of discretion by the trial court, in refusing separate trials of joint defendants in a civil action, will not be reviewed on appeal, unless it clearly appears that the discretion was abused. *Hunt* v. *Missouri Railroad Company*, 160.

4. IMPERFECT RECORD — CERTIORARI. — If the transcript from the trial courts omits a refused instruction, and the appellant does not ask for a *certiorari* or take any step for having the record perfected, but submits his cause to the appellate court upon the record as it stands, he can not demand a reversal because of the incompleteness of the record. *The State* v. *Hayes*, 173.

5. BILL OF EXCEPTIONS — AFFIDAVITS. — Objections to the rulings of the trial court, or to improper remarks of counsel in argument, will not be considered on appeal, when they are preserved only in affidavits filed with the motion for a new trial, and are not preserved in the bill of exceptions. *Id.*

6. —— NEW TRIAL. — An appellate court will review questions raised upon exceptions to a referee's report which is wholly in writing, though the motion for a new trial was overruled at the second term after judgment, and though a continuance of the motion from the first to the second term after judgment does not affirmatively appear. *Nelson* v. *Withrow*, 270.

7. ACTIONS — JURY. — The test of a right of trial by jury is the action and not the defence or the issues. *Smith* v. *St. Louis Beef Canning Company*, 522.

Digitized by Google

PRACTICE — Continued.

8. —— EQUITY. — The interposition of an equitable defence to an action for a breach of contract does not deprive the plaintiff of his right of trial by jury. *Id.*

9. MISJOINDER — MARRIED WOMEN. — The unnecessary joinder of the trustee of a married woman with her in an action for injury to realty belonging to her at the date of the injury, is not ground for a reversal of a judgment for the plaintiff, on appeal. — *Nelson* v. *Connecticut Mutual Life Insurance Company*, 592.

10. VERDICT — INSTRUCTIONS. — The verdict being for the right party, that the jury disregards improper instructions is not ground for a reversal, on appeal. *Id.*

11. SURPRISE. — That the court admits evidence tending to show payment when the plea of payment is not averred with technical accuracy, is not ground for a reversal of the judgment in the absence of any question of surprise. — *Parks* v. *Richardson*, 593.

12. JURY. — A cause will not be reversed because the jury have found a fact contrary to the uncontradicted testimony of several witnesses. *Roos* v *Clark*, 594.

13. INSTRUCTIONS. — The judgment in a civil action will not be reversed because the instructions were not explicit, if those given were correct and no legal instruction was refused. *Cahill* v. *Liggett & Meyers Tobacco Company*, 596.

14. EVIDENCE. — The admission of incompetent testimony which it does not appear could have prejudiced the appellant, is not ground for a reversal of the judgment on appeal. — *Lesinsky* v. *Great Western Dispatch*, 598.

PRACTICE, APPELLATE COURTS. See PRACTICE.

1. NEW TRIAL. — Appellate courts will not interfere with the trial court's exercise of discretion in overruling a motion for a new trial, unless such discretion has been manifestly abused. *Fendler* v. *Dewald*, 60; *Pearson* v. *Union Railway Company*, 580.

2. EXHIBITS. — An appellate court will not consider exhibits which were not before the trial court for consideration. *Cassatt* v. *Vogel*, 317.

3. EVIDENCE. — Objections to evidence which are not specifically made at the trial will not be considered on appeal. *Augusta Wine Company* v. *Weippert*, 483.

4. APPEALS. — The rule that questions determined on a former appeal will not be reviewed, has no application to questions presented, but not considered. *Lampert* v. *Laclede Gas-Light Company*, 376.

5. BRIEFS. — A failure to file a statement and brief is ground for an affirmance of the judgment. *Downing* v. *Kinealy*, 575.

Digitized by Google

PRACTICE, APPELLATE COURTS — Continued.

6. APPEALS — The appeal being frivolous the judgment will be affirmed with ten per cent damages. *Smith* v. *Smith*, 575.

7. FINDINGS. — A finding by the court, without a jury, will not be reversed as being against the evidence, if it can be sustained on any theory of the law applicable to the facts. *Alabama and Georgia Manufacturing Company* v. *Third National Bank*, 576.

8. EQUITY. — In equity proceedings an appellate court will examine and weigh the evidence. *Heman* v. *Skrainka*, 577.

9. —— An appellant will not be heard on appeal to say that the decree is more favorable to him than the facts of the case warrant. *Id.*

10. EXCEPTION. — Questions as to whether a cause was properly referred or as to whether the referee erred in admitting testimony, are matters of exception, and will not be reviewed on appeal in the absence of a motion for a new trial. *Donahue* v. *Maloney*, 578.

11. EVIDENCE. — When there is evidence that the parties had, because of the necessities of the case, agreed that their contract should be executed on the basis of certain hearsay testimony, a finding of fact as to this will not be reviewed, on appeal, for the purpose of determining that the hearsay evidence was inadmissible. *Ring* v. *Canada Southern Line*, 579.

12. WEIGHT OF EVIDENCE. — The evidence being substantial and the instructions unexceptional, an appellate court will not reverse a conviction on the sole ground that it seems to be against the weight of the evidence. *The State* v. *Schmidt*, 581.

13. STIPULATIONS. — Parties will in no case be allowed to stipulate and submit the cause upon the record. Unless a statement and brief be filed by the appellant the appeal will be dismissed. *The State* v. *Burns*, 581.

14. EQUITY — MARRIED WOMEN. — In a proceeding in equity to subject the property of a married woman to the payment of the contract price of work, the appellate court will review the evidence. *Lewis* v. *Thomas*, 581.

15. —— WEIGHT OF EVIDENCE. — In such an action a judgment for the plaintiff will be reversed on appeal, where the substantial weight of the evidence is against the finding. *Id.*

16. MOTION TO QUASH — EXCEPTIONS. — The overruling of a motion to quash an indictment on the ground of a material change in the indictment, will not be reviewed where there is nothing in the bill of exceptions to show in what respect the indictment was changed. *The State* v. *Pollard*, 583.

Digitized by Google

PRACTICE, APPELLATE COURTS — Continued.

17. REVIEW. — The court of appeals will not review questions determined by the supreme court in the same case on a former appeal. *Dowling* v. *Allen*, 590.

18. NEW TRIAL. — An appellate court will not consider points not raised by the motion for a new trial. *Hildreth Printing Company* v. *Stokes*, 591; *Daily* v. *Singer Manufacturing Company*, 597.

19. WEIGHT OF EVIDENCE. — Appellate courts will not weigh evidence in law cases. *Traube* v. *Chicago & Alton Railroad Company*, 591.

PRACTICE, TRIAL COURTS. See PRACTICE.

1. TENDER AND ACCEPTANCE. — A plaintiff who, in accordance with the profert, accepts money paid into court in discharge of the demand sued on, thereby ends the suit and is liable for all costs which accrue thereafter. *Haeussler* v. *Duross*, 103.

2. —— A plaintiff who so withdraws money can not afterwards claim that it was accepted merely as a payment on account. *Id.*

3. JUDGMENTS — ERROR CORAM NOBIS. — A judgment rendered in consequence of an error of fact which does not appear of record may be vacated on motion, or petition in the nature of a writ of error *coram nobis*, of the party against whom it is rendered. *The State ex rel.* v. *Heinrich*, 146.

4. CUMULATIVE CHALLENGES OF JURORS. — Concurrent acts of negligence by several defendants tending to a common result injurious to the plaintiff, do not constitute several causes of action, and do not entitle such defendants to separate trials, or to cumulative rights of peremptory challenge. *Hunt* v. *Missouri Railroad Company*, 160.

5. BAR TO ACTION — SPLITTING DEMANDS. — A recovery by the assignee of a part of a demand, is not a bar to a recovery by the original creditor for the balance. The rule relative to the splitting of demands does not apply. *Fourth National Bank* v. *Noonan*, 243.

6. VERDICT — MOTION IN ARREST. — A general finding for the plaintiff without any special finding upon the defendant's counter-claim is an imperfect finding, of which advantage can be taken only by a motion in arrest of judgment. *Erdbruegger* v. *Meier*, 258.

7. DEMURRER. — On demurrer the trial court does not look at exhibits not made a part of the pleadings. *Cassatt* v. *Vogel*, 317.

8. NEW TRIAL. — It is error for the trial court to order that, unless the defendant, in whose favor a verdict is rendered on account, will consent to a judgment against him for a specified sum, a new trial will be granted; but, if the defendant consents, the error is not ground for a reversal on the plaintiff's appeal, where the original verdict is warranted by the evidence. *Kortjohn* v. *Altenbernd*, 342.

Digitized by Google

PRACTICE, TRIAL COURTS — Continued.

9. NOTICE — APPEAL FROM JUDGMENT OF A JUSTICE. — On appeal from a justice's judgment, it is error to dismiss the suit for want of notice of appeal before the second term at which the cause is triable. *Davis* v. *Schields*, 397.

10. EVIDENCE. — An instruction excluding evidence may properly be refused if proper objections were not made when the evidence was offered, even though the evidence should have been excluded upon proper objection thereto. *Ring* v. *Canada Southern Line*, 579.

11. WAIVER. — Objections to evidence not distinctly made at the time the evidence is offered are waived. *Id.*

12. NEW TRIAL. — An application for a new trial on the ground of newly discovered evidence must show diligence. *The State* v. *Schmidt*, 581.

13. CONTINUANCES. — A refusal to grant a continuance in a criminal case is not ground for a reversal except where the trial court's discretion has been manifestly abused. *The State* v. *Pollard*, 583.

14. JURORS. — The acceptance of a juror by a defendant in a criminal action is a waiver of objections on account of matters stated by the juror on his *voire dire* examination. *Id.*

15. ATTORNEYS. — Objections to statements made by counsel in argument to the jury will not avail when made for the first time in the appellate court. *Id.*

16. NEW TRIAL. — The mere fact that the juror was temporarily separated from his fellows during their deliberation is not ground for a new trial. *Id.*

17. JURY. — In a new trial for other than a capital offence the record need not recite that the officer who had charge of the jury was specially sworn. *Id.*

18. PRESUMPTIONS. — In the absence of a contrary statement it will be presumed that an officer, whose duty it was to be sworn, was sworn. *Id.*

19. NEW TRIAL. — A new trial will not be granted on the ground that the accused was a negro and the jurors were all white men. *Id.*

20. AMENDMENTS. — It is within the discretion of the trial court to allow the sheriff to amend his original return so as to make it show that the garnishee was summoned, where the garnishee has appeared and answered. *St. Louis Brokerage Company* v. *Cronin*, 587.

21. JURY — FINDINGS. — A finding by the jury as to defendants as to whom the action was dismissed at the close of the plaintiff's case, is unnecessary. *Grogan* v. *Broadway Foundry Company*, 588.

22. VERDICT — TWO COUNTS. — A verdict for nominal damages on one of two counts for the same cause of action may, in support of the

Digitized by Google

PRACTICE, TRIAL COURTS — Continued.

judgment, be taken as a verdict for the defendant, where the substantial verdict is for the plaintiff on the other count. *Nelson* v. *Connecticut Mutual Life Insurance Company*, 592.

23. NEW TRIALS. — A motion for a new trial on the ground of newly discovered evidence is properly overruled unless accompanied by an affidavit showing diligence. *Williamson-Stewart Paper Company* v. *Hilder*, 596.

24. INSTRUCTIONS. — The trial court is not bound to give instructions of its own motion — it is the duty of counsel to ask for such instructions as his cause demands. *Cahill* v. *Liggett & Meyers Tobacco Company*, 596.

PRESUMPTIONS. See ATTORNEYS, 4; DAMAGES, 1; FOREIGN STATUTES; INFANTS 4; POLICE, 5; PRACTICE, TRIAL COURTS, 18.

PRACTICE — FOREIGN LAWS. — The presumption is in favor of the action of the trial court in refusing to admit a certificate of foreign incorporation when the record does not show what was the corporation law of the foreign jurisdiction. *Rohan* v. *Richmond*, 595.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See INJUNCTION, 4, 5, 6, 7.

CONTRACTS. — Material alterations in a contract will discharge the surety, if made without his consent. *Gugerty* v. *Vieths*, 577.

PROTEST.

1. NOTICE — DUE DILIGENCE. — Notice of protest sent by mail is insufficient where the holder and the indorser of the protested paper reside at the same place. *Bank of Commerce* v. *Chambers*, 152.

2. —— A notice of protest sent by mail to a member of congress at Washington, while he is engaged in discharging his duties as such, is good. *Id.*

3. —— Where the indorser has different places of business and different places of residence, notice must be sent to the place where, upon diligent inquiry, it seems most likely to reach him with promptness. *Id.*

4. —— Where the indorser is in the habit of receiving his mail at other than the general office of a place, which fact is unknown to the notary, notice addressed to the place generally, is sufficient. *Id.*

5. —— It is not essential to the validity of a notice of protest that it should be addressed to the post-office at which the indorser gets his mail if, in the usual course of the mail, it will be sent to and delivered from such office. *Id.*

Digitized by Google

PROTEST — Continued.

6. —— The law does not exact of the holder that he should give actual notice of protest to the indorser, but only that he should use reasonable diligence to do so. *Id.*

PUBLIC POLICY. See CONTRACTS, 1; INSURANCE.

QUANTUM MERUIT. See CONTRACTS.

1. ACTION. — The rule that one who sues upon a contract can not recover upon a *quantum meruit* does not apply where the defendant sets up the *quantum meruit* and prays judgment on that basis. *Lewis* v. *Thomas*, 581.

2. PRACTICE. — In such a case the plaintiff should be allowed to elect whether he will abide by a judgment on the *quantum meruit*, or take back the property on the basis of a total failure to perform the contract. *Id.*

RAILROADS. See COMMON CARRIERS; CONSTITUTIONAL LAW, 2; CRIMINAL LAW, 9; DAMAGES; MUNICIPAL CORPORATIONS, 4; NEGLIGENCE.

RECEIVERS.

1. EQUITY — Assets distributed to shareholders, subject to a pledge to secure creditors, belong in equity, after the debts for which the pledge is made are paid, not to the receiver of the corporation, but to the shareholders. *Heman* v. *Britton*, 121.

2. COSTS. — The debts of the corporation being paid, assets distributed among the shareholders subject to a pledge for the payment of such debts, can not be subjected to the payment of the costs of the receiver's administration. *Id.*

REFEREES.

1. EQUITY PRACTICE. — A referee's findings of fact in an equity proceeding is not conclusive upon the trial, or the appellate, court. *Heman* v. *Britton*, 121.

2. REPORTS — PRACTICE. — Except when limited in time by the order of reference, a referee is not bound to report to the next term of court. *Francisco* v. *Rowland*, 600.

3. —— The court may at any time extend the time within which a referee must file his report. *Id.*

4. REVIEW. — The finding of a referee is like the special verdict of a jury, and will not be reviewed where the evidence is not preserved by a bill of exceptions. *Id.*

REFERENCES.

1. LONG ACCOUNT. — Where the account sued on and the counterclaim contain respectively twenty-seven and fifteen items, the

Digitized by Google

REFERENCES — Continued.
court may, of its own motion, refer the cause. *Francisco* v. *Rowland*, 600.

2. —— That, on the hearing before the referee, the number of items are greatly reduced by the concession of the parties, is immaterial as affecting the order of reference. *Id.*

RES ADJUDICATA. See STREETS, 6.

STATUTE OF LIMITATIONS — FOREIGN JUDGMENTS. — A judgment against the plaintiff in one state, on a demurrer to a plea of the statute of limitations, is a bar to a suit on the same cause of action in another state. *Fulton Iron Works* v. *Riggin*, 821.

RES GESTÆ. See EVIDENCE, 5, 7.

REVENUE. See TAXES.

SALES. See ADMINISTRATION; PARTITION, 1, 2.

1. TITLE. — Title to goods sold "on memorandum," that is, "sale or return," passes to the vendee upon delivery, subject to a defeasance by exercising the option to return the goods. *Ammidown* v. *Powell*, 578.

2. —— Until the right to return has been exercised the goods are at the vendee's risk, and if they are destroyed in his possession he is liable for their agreed value. *Id.*

3. CONTRACTS. — A sale of staple goods "on memorandum" for the "price prevailing in the market next January" is not void for uncertainty, if the price can be definitely fixed by testimony. *Id.*

4. DELIVERY. — Where no place of delivery of an article purchased is named in the contract, the place of the sale will be the place of the delivery. *Lewis* v. *Thomas*, 581.

5. EXECUTIONS — JUDGMENTS — VARIANCE. — A variance between the execution and the judgment which is not substantial will not render a sale under the execution void, if the judgment can readily be identified from the execution. *Howard* v. *Still*, 584.

6. CONDITIONAL. — Section 2508, of the Revised Statutes, as to the duty of vendors, has no application to unconditional sales of chattels. *Daily* v. *Singer Manufacturing Company*, 597.

SHERIFF. See PRACTICE, TRIAL COURTS, 20.

1. SUMMONS AND RETURN. — The return of a sheriff to a summons which shows a substantial compliance with legal requirement, is sufficient. *Howard* v. *Still*, 584.

2. —— In construing such a return the construction most favorable to the officer's having performed his duty will be given. *Id.*

Digitized by Google

STATUTES.

1. CONSTRUCTION OF — RULE OF INTERPRETATION. — The subject-matter, the context, and the apparent intent of the legislature are to be considered in interpreting a statutory clause. *City of St. Louis* v. *Herthel*, 467.

2. —— GENERAL AND SPECIAL WORDS. — General words, in a city charter, preceded by particular words, are to be held as applying to the persons or things of the same kind as those that precede. *Id.*

3. —— EJUSDEM GENERIS. — Architects, as members of a liberal profession, are *ejusdem generis* with lawyers, doctors, artists, and others of like professions. *Id.*

4. MUNICIPAL CORPORATIONS — CITY CHARTER — LICENSES. — A city charter which empowers the municipal legislature to "license, tax, and regulate lawyers, doctors, dentists, artists," and others enumerated, and which concludes with the words, "and all other trades, avocations, or professions whatever," empowers the city to impose a license tax upon architects, though they be not expressly named. *Id.*

5. —— The passage of a statute prohibiting the taxing of lawyers, doctors, and others enumerated, does not affect the right of the municipality to tax other professions not enumerated or included in the inhibition by general terms. *Id.*

6. EXEMPTIONS — TAXES. — A statute which grants extraordinary exemptions from taxation will be strictly construed. *The State ex rel.* v. *Central St. Louis Masonic Hall Association*, 597.

STATUTE OF FRAUDS.

1. PERFORMANCE. — Entire performance of a contract by one of the parties to it takes the contract out of the operation of the statute of frauds. *Hoyle* v. *Bush*, 408.

2. BROKERS. — A promise by a principal to repay to his broker money paid on reclamations, ordered paid by the principal, for defects in goods sold by the broker for his principal, is not within the statute of frauds. *Dewey* v. *Massingale*, 579.

STATUTE OF LIMITATIONS. See RES ADJUDICATA.

STOCK. See DAMAGES, 1, 2, 3, 6, 7.

STOCKHOLDERS. See CORPORATIONS.

1. LIABILITY OF. — Shares of stock having, under the statute, been allotted, among other things, to a widow, out of her husband's estate, and an order of distribution made and the estate settled, she, having assented to the order and accepted a part of the property so allotted, became a stockholder and liable to a creditor of the corporation. *Coquard* v. *Marshall*, 80.

Digitized by Google

STOCKHOLDERS — Continued.

2. —— This liability attaches though she had not actually received the stock, and though there had been no transfer on the books of the corporation to her or to the administrator. *Id.*

3. —— The creditor's failure to prove up the claim, which had matured, against the deceased stockholder's estate is no bar to an action against the distributee of the stock. *Id.*

4. —— A creditor who first sues a stockholder does not thereby acquire an indefeasible priority. *Id.*

5. —— That proceedings by other creditors against the stockholder are pending is no defence to the action. *Id.*

6. —— Liability of a shareholder having become fixed by a subscription, can not be avoided by giving notice to the promoter that the subscriber declines to take the stock. *Haskell* v. *Sells*, 91.

7. —— Such a liability is not affected by the subscriber's failure to meet subsequent calls or to take part in proceedings of the corporation, or by the fact that no calls were made upon, or stock issued to, him. *Id.*

8. NEGOTIABLE INSTRUMENTS. — A stockholder who sells his stock to one who offers him, in part payment, the negotiable securities given by him to the corporation for the stock, is not bound to inquire as to how these securities were obtained. *Alexander* v. *Rollins*, 109.

9. —— NOTICE. — A stockholder who sells his stock is not, by reason of entries on the books of the corporation, which do not evidence fraud, affected with notice of a fraudulent conspiracy between the directors and the purchaser to wreck the corporation. *Id.*

10. PROCEEDINGS BY MOTION — EXECUTIONS. — In a proceeding by motion against a stockholder it is sufficient if it be shown that execution issued against the corporation and that there was no property whereon to levy it, though the return of *nulla bona* on the execution be made before the return day. *Knight* v. *Frost*, 331.

11. —— NOTICE OF MOTION — PRACTICE. — A plaintiff having given notice of his motion against a stockholder, on a *nulla bona* return of the execution, that he causes a second execution to issue and gives a second notice is not necessarily fatal to his recovery on the first motion, he having dismissed his second motion. *Id.*

12. ACTIONS. — To warrant a suit by a creditor of a corporation against a stockholder, under the statute, without joining the corporation, it should appear that the corporation is practically dissolved. *Donnelly* v. *Hodgson*, 548.

13. —— When the petition alleges a corporate existence, and the evidence shows that the corporation (a bank) had ceased to receive deposits, had not the means, and did not intend, to resume busi-

Digitized by Google

STOCKHOLDERS — Continued.

ness, that it was proceeding to wind up its business, that notes given in settlement to creditors were past due, a proceeding founded on one of these notes against a stockholder can not be maintained under section 745 of the Revised Statutes. *Id.*

14. —— The statute (sect. 736) which authorizes a proceeding by a judgment creditor against the stockholder of an insolvent corporation does not make the stockholder a debtor of such judgment creditor. *Id.*

15. —— ADMINISTRATION. — A creditor of a corporation not shown to have been dissolved can not have his claim against the corporation allowed against the estate of a deceased stockholder who owned unpaid stock. *Id.*

16. CREDITOR'S MOTION. — A proceeding by a creditor of a corporation against a stockholder can be begun, under the statute, only by motion in the original action against the corporation. *Paxson* v. *Talmage*, 586.

17. —— PLEADINGS. — An original petition against a stockholder which alleges that the plaintiff is a judgment creditor of an insolvent corporation, that execution against the corporation has been returned *nulla bona*, and that the defendant is the holder of unpaid stock in the corporation, states no cause of action at common law. *Id.*

18. PRACTICE. — Where an answer to such a petition is filed, and a motion to strike out parts of the answer is filed, the court may treat the answer as a demurrer, and may strike out the petition. *Id.*

STREETS.

1. USER — ACCEPTANCE. — To constitute a public street, there must be a public user or an acceptance in some manner by the city. *Skrainka* v. *Oertel*, 474.

2. SCHEME AND CHARTER — JURISDICTION. — The framers of the scheme and charter had power to confer jurisdiction in street opening proceedings upon the circuit court. *St. Louis* v. *Greely*, 578.

3. CONSTITUTIONAL LAW — BENEFITS. — The constitution of 1875 imposes no obligation that, before the levy of the tax, a district shall be ascertained within which benefits for the street opening shall be assessed. *Id.*

4. PLEADINGS. — Petitions for street opening proceedings need not set out the manner in which commissioners were qualified. *Id.*

5. JUDICIAL NOTICE. — Courts will take judicial notice of the statutory qualifications prescribed for street commissioners. *Id.*

6. JUDGMENTS. — The assessment of benefits in street opening proceedings is not a judgment which concludes the property holder. *Id.*

Digitized by Google

STREETS — Continued.

7. EVIDENCE. — The tax bills issued under a street opening proceeding is not *prima facie* evidence, as in other cases. *Id.*

8. DEFENCES. — A defendant in an action to collect the tax may make any defence which he could have made in the condemnation proceedings. *Id.*

9. NOTICE. — It is immaterial that a property-holder who is properly summoned in an action to enforce the lien of such special tax, had no notice of the original proceedings. *Id.*

10. DAMAGES FOR CHANGE OF GRADE. — In an action for damages for injury to property caused by a change of grade of a street, it is immaterial that the change was necessary to carry on the traffic of the street. *Mitchell* v. *City of St. Louis*, 600.

11. —— Under the charter of 1870, the city of St. Louis is liable for damages sustained by property holders by reason of the change of grade of a street so as to divest the current of travel, though the change does not extend to the whole road-bed. *Id.*

12. —— Under the charter and the ordinances of 1871, the city is liable to the owners of abutting real estate upon which permanent improvements have been made, for damages occasioned by a change of grade. *Id.*

SUPERSEDEAS. See APPEAL, 1.

TAXES. See EJECTMENT, 7; STATUTES, 4, 5, 6.

1. CONSTITUTIONAL LAW. — A revenue law which provides for a judgment for taxes without personal service upon the owner of the land and for summary proceedings to collect the same, is not necessarily unconstitutional. *Francis* v. *Grote*, 324.

2. LIMITATIONS — EJECTMENT. — Under the limitations imposed by the revenue law of 1872, a recorded tax deed is, after the lapse of three years, a bar to an entry in an action of ejectment against the purchaser at tax sale, unless such sale is absolutely void. *Id.*

3. CONSTITUTIONAL LAW. — Taxing power is granted to the city of St. Louis by the constitution of 1875. *St. Louis* v. *Greely*, 578.

4. ACTIONS. — An action to collect back taxes is a suit *inter partes* and governed by the ordinary rules in such actions. *Howard* v. *Still*, 584.

5. PRACTICE. — The power conferred upon the governor to purchase land for the state at tax sales must be exercised in the mode prescribed; but the sheriff's return, or deed, need not show how this power was exercised. *Id.*

6. TENDER. — A tender of the amount of the judgment and costs by the former owner is of no avail after a sale under a judgment for back taxes. *Id.*

Digitized by Google

TAXES — Continued.

7. HUSBAND AND WIFE. — Evidence that the husband resides on the property will support a judgment for possession against a husband and wife. *Id.*

8. EXEMPTIONS. — A statute which grants extraordinary exemptions from taxation will be strictly construed. *The State ex rel.* v. *Central St. Louis Masonic Hall Association*, 597.

9. —— An exemption from taxation of property purchased for the purpose of erecting a hall is not an exemption from taxation of property with a hall already erected. *Id.*

10. —— CHARITY. — In the absence of allegation or proof it will not be assumed that a Masonic institution is a charity. *Id.*

TENDER.

1. PRACTICE. — A withdrawal by the plaintiff of money paid into court in discharge of the demand sued on, is as an acceptance of a tender. *Haeussler* v. *Duross*, 103.

2. —— A plaintiff who so withdraws money can not afterwards claim that it was accepted merely as a payment on account. *Id.*

TITLE. See EJECTMENT, 3, 4; SALES, 1.

1. ACTION TO QUIET TITLE — POSSESSION. — In a proceeding, under the statute, to quiet title, there can be no proof of title for the purpose of raising the legal presumption of possession. *Dyer* v. *Krackauer*, 39.

2. —— In such a proceeding a mere legal presumption of constructive possession will not satisfy the statute. *Id.*

3. —— A plaintiff who has such a possession as will prevent him from maintaining ejectment, may maintain an action to quiet title. *Id.*

4. —— The fencing of land may be a trespass, and is not conclusive of possession in an action to quiet title. *Id.*

TORTS.

Where one of two persons must suffer by the wrongful act of a third person the loss must fall upon him who placed it in the power of the third person to do the wrong. *Carroll* v. *People's Railway Company*, 490; *Crews* v. *Garneau*, 505.

UNLAWFUL DETAINER.

1. EXECUTIONS — COSTS. — Execution may properly issue for damages and costs upon the judgment of a justice in unlawful detainer, after restitution of the premises. *Cabanné* v. *Spaulding*, 312.

2. JUSTICES — COMPLAINT. — A complaint in unlawful detainer before a justice, substantially of the form given at page 730 of the Revised Statutes, is sufficient. *Id.*

Digitized by Google

USES AND TRUSTS. See MARRIED WOMEN, 3.

EVIDENCE — RESULTING TRUSTS. — It requires evidence of the most convincing character to establish a resulting trust; and the oral evidence to establish a resulting trust in the face of an absolute deed should be so emphatic and unequivocal as to banish every reasonable doubt. *Shaw* v. *Shaw*, 580.

VARIANCE. See DAMAGES, 3; SALES, 5.

1. SUBSCRIPTION — CORPORATIONS. — There is no variance between a subscription list under the name, "The Missouri Cotton Seed Oil Company," and the articles of incorporation which add thereto the words, "of St. Louis." *Haskell* v. *Sells*, 91.

2. DAMAGES. — Proof that the damage occurred three years prior to the time alleged in the petition does not constitute a variance. *Lesinsky* v. *Great Western Dispatch*, 598.

VENDOR AND VENDEE. See SALES.

VENUE. See CRIMINAL LAW, 8.

CRIMINAL LAW. — The question of venue in a criminal case is to be proved as any other fact. *The State* v. *Ruth*, 226.

VERDICT. See PRACTICE, TRIAL COURTS, 22.

WAIVER. AGENCY, 2; APPEALS, 3; COMMON CARRIERS, 3; EQUITY, 2; JUSTICES, 2; MORTGAGES, 7; PLEADING 1.

He who relies on a waiver must show that it was made with knowledge of the material facts. *Dyas* v. *Hanson*, 363.

WITNESSES. See DIVORCE, 1; HUSBAND AND WIFE, 3; NOTARIES PUBLIC, 1; PARTNERSHIP, 2.

ATTORNEYS. — That one called as a witness for the plaintiff is attorney for the defendant in another matter does not disqualify him as a witness. *Martin* v. *Prietto*, 596.

WRITS OF ERROR. See PRACTICE, TRIAL COURTS, 3.

Ex. G. a. a.

Digitized by Google